

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANTS' BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,591

988

ARTHUR E. SUMMERFIELD, ET AL., APPELLANTS,

v.

PARCEL POST ASSOCIATION, INC., ET AL., APPELLEES

**ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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*United States Court of Appeals
For the
District of Columbia Circuit*

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CLERK

QUESTIONS PRESENTED

1. Whether the Postal Policy Act of 1958 is intended to, and does, govern reformatations of parcel post rates by the Postmaster General.

2. Whether a suit by users of the parcel post to set aside a reformation of parcel post rates by the Postmaster General and to set aside the action of the Interstate Commerce Commission granting consent to the proposed rates is an unconsented suit against the United States.

3. Whether such a suit presents a justiciable controversy.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,591

ARTHUR E. SUMMERFIELD, individually and as Postmaster General, and KENNETH H. TUGGLE, CHAIRMAN, CLYDE E. HERRING, ANTHONY F. ARPAIA, HOWARD G. FREAS, JOHN H. WINCHELL, EVERETT HUTCHINSON, RUPERT L. MURPHY, LAURENCE K. WALRATH, DONALD P. MCPHERSON, JR., ABE MCGREGOR GOFF, CHARLES A. WEBB, individually and as members of the Interstate Commerce Commission, APPELLANTS,

v.

PARCEL POST ASSOCIATION, INC., HENRY FIELD SEED AND NURSERY Co., INC., POPULAR MERCHANDISE Co., INC., and WILSON CHEMICAL Co., INC., APPELLEES

*ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

By their complaint filed December 1, 1959, the appellees, consisting of a trade association and three of its members, seek injunctive and declaratory relief against the Postmaster General and the members of the Interstate Commerce Commission. They demand an injunction setting aside certain fourth-class mail (parcel post and catalogue) rates which became effective February 1, 1960, and annul-

ling the action of the defendant Commissioners granting consent to the rates. Appellants are sued in their individual and official capacities.

On December 14, 1959, appellants moved to dismiss the complaint. On January 12, 1960 Judge McGarraghy issued an amended order denying the motion to dismiss and also denying appellees' motion for a preliminary injunction. This order contained the finding that it involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation. On January 21, 1960 appellants applied to this Court for permission to appeal from the order of January 12. Appellees joined in this application. The application was granted February 5, 1960. Notice of appeal was filed February 12, 1960. The jurisdiction of this Court rests upon 28 U.S.C. 1292(b). The jurisdiction of the Court below was invoked pursuant to 28 U.S.C. 1339, 1331, and 1337; Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009; Sections 305 and 306 of Title 11 of the District of Columbia Code; and the Declaratory Judgments Act, 28 U.S.C. 2201 and 2202.

STATEMENT OF POINTS

1. The District Court erred in holding that the Postmaster General in his reformation of fourth-class postal rates should have considered the standards outlined in the Postal Policy Act of 1958.

2. The District Court erred in impliedly holding that this is not an unconsented suit against the United States.

3. The District Court erred in impliedly holding that this suit presents a justiciable controversy.

STATEMENT OF THE CASE

By virtue of 39 U.S.C. 247 the Postmaster General is directed to reform the rates applicable to parcel post and catalogs when he finds on experience that the existing rates are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater

than the revenues from it. This direction is made subject to the consent of the Interstate Commerce Commission "after investigation." By the terms of 31 U.S.C. 695 the Postmaster General is barred from withdrawing any funds from the Treasury until he certifies in writing that he has requested the consent of the Interstate Commerce Commission to the establishment, pursuant to 39 U.S.C. 247, of fourth-class rates sufficient to cover costs, within a tolerance of 4%—that is, revenues may exceed costs, or costs may exceed revenues by that percentage. P.L. 85-426, May 27, 1958, Title II, Section 213, 72 Stat. 143.

There is no statutory requirement that hearings be held, either by the Postmaster General or by the Interstate Commerce Commission, on reformation of rates. The Postmaster General is required to take action when he "shall find on experience" that the specified conditions exist. The consent of the Interstate Commerce Commission is to be given "after investigation" 39 U.S.C. 247.

On April 18, 1957 the Postmaster General filed with the Interstate Commerce Commission a preliminary request for consent to an increase in parcel post and catalogue rates. By Commission order of May 20, 1957, docket No. 32158 was established, entitled *Increased Parcel Post Rates, 1957* (J.A. 104). No schedules of increases were filed at that time. Subsequently, a schedule of proposed increases was published. Interested parties were given an opportunity to obtain information about the proposals and to confer with representatives of the Post Office Department as well as to submit data, views and arguments. 23 F.R. 1556, 23 F.R. 1771. The Postmaster General on November 28, 1958 filed an amended request in Docket No. 32158 with the Commission for consent to the establishment of the increased rates here in issue (J.A. 8). This amended request recited that he had found that the rates then in effect were such as to render the cost of fourth-class mail service greater than the receipt of revenue therefrom by approximately \$88 million. (Complaint, par. 18, J.A. 8). By report and order, both dated November 17, 1959, (J.A. 76, 104) the Commission, after investigation, consented to the

proposed increase. The Commission found that the Postmaster General's cost allocations were substantially accurate and that the proposed rates were necessary and reasonably adapted to cover fourth-class costs within the limits set for in 39 U.S.C. 247 and 31 U.S.C. 695. (J.A. 101).

On November 25, 1959, there was published in the Federal Register, 24 F.R. 9477-78, the Postmaster General's order that the revised rates become effective February 1, 1960. The rates have been in effect since that date.

On December 1, 1959, the appellees, consisting of a trade association and three of its members who are users of the parcel post, filed a complaint in the United States District Court for the District of Columbia seeking to restrain the Postmaster General from placing the increases into effect and asking the Court to set aside and declare unlawful the action of the Interstate Commerce Commission granting the Postmaster General's application for consent to these rates (J.A. 2 et seq.). Appellants' motion to dismiss the complaint and appellees' motion for a preliminary injunction were heard together and were denied in the same order on January 12, 1960 (J.A. 119).

In its memorandum (J.A. 117-8) the Court below expressed its opinion that "the standards outlined in the Postal Policy Act of 1958 must be considered in fixing fourth-class postal rates and, therefore, in view of the allegations in the complaint, the motion to dismiss will be denied." The Court did not explicitly rule on appellants' contentions that this is an unconsented suit against the United States and that it presents no justiciable controversy. The effect of the order is to deny them by necessary implication.

The appellees assert that the fixing of the new rates by the Postmaster General was erroneous in two respects. One of these relates to the preferential services which first-class mail receives, and the other relates to the Postmaster General's alleged failure to consider the effect on fourth-class mail costs of certain services which are de-

scribed as "public services" in the Postal Policy Act of 1958.

As to the first heading, appellees claim that in fixing fourth-class rates the Postmaster General should have allocated to the costs of *first*-class mail an amount representing the fair value of the extraordinary and preferential services received by it and, having made such an allocation, should have reduced accordingly the amount of expenses he allocated to fourth-class mail (Complaint, pars. 19(b) through 19(e), J.A. 8, 9).

As to the second heading, they claim that he should have determined the losses of the star route system and of third-class and fourth-class post offices (these being "public services" as defined in the Postal Policy Act) and should have eliminated from costs allocated to fourth-class mail any amounts representing those losses (Complaint, pars. 19(f) through 19(i), J.A. 9).

SUMMARY OF ARGUMENT

A. The Postal Policy Act of 1958 is, as its name implies, a statement of Congressional policy intended to be implemented by the action of the Congress itself. It is not, and does not purport to be, a set of directions to the Postmaster General, nor does it require or permit implementation by the Postmaster General.

B. The fixing of parcel post rates is a function of the sovereign and an attempt to enjoin the fixing of such rates is a suit against the United States. Therefore, even if the agents to whom the power is delegated act wrongfully in their exercise of those powers suit will not lie unless the sovereign has consented. Appellees' attempt to find in the Postal Policy Act any consent by the sovereign to be sued must fail. The Act contains no such consent.

C. The suit presents no justiciable controversy for the reason that appellees can show no invasion of any right of theirs. The claim that they are damaged by reason of the increase in parcel post rates is merely a claim that they will suffer the same financial loss suffered by all

users of the parcel post. They have neither a common law right nor a statutory right to any particular level of parcel post rates. In the absence of any legally protected right of theirs they may not properly invoke the jurisdiction of the courts to review administrative action taken by the Postmaster General and the Interstate Commerce Commission.

ARGUMENT

Introductory Statement

The controlling question of law certified by the Court below as the basis for this appeal is whether the Postal Policy Act of 1958 is applicable to the reformation of parcel post and catalogue rates by the Postmaster General. It is the appellants' position that the Act lays no mandate upon the Postmaster General with respect to such reformations, and contains no waiver of sovereign immunity. This is demonstrated in Point I of the argument. It follows from this that this Court's decision in *Doehla Greeting Cards, Inc. v. Summerfield*, 97 App. D.C. 29, 227 F. 2d 44, holding such a suit as this to be an unconsented suit against the United States, is controlling here. This is shown in Point II. Point III shows that the examination of the Act required by Point I necessarily leads to the conclusion that the complaint presents no justiciable controversy.

I. The Postal Policy Act gives no directions to the Postmaster General relative to the reformation of fourth-class rates, but is a statement of Congressional policy designed to be implemented by the Congress itself.

The Postal Policy Act,¹ as its name implies, is a statement of Congressional policy which is not intended to and which does not direct the Postmaster General in his reformations of fourth-class rates. The following section-by-section discussion of the Act will show that it does not

¹ 39 U.S.C. 270-270d, inclusive, P.L. 85-426, Title I, May 27, 1958, 72 Stat. 138.

in any way modify the two statutes under which he acted in the present instance, 39 U.S.C. 247 and 31 U.S.C. 695.

The Act, which is set forth in full at pages 22-29, begins with its short title (§ 101) and a set of Congressional findings (§ 102, 39 U.S.C. 270). In these Congress traces in general terms the purpose, development and effect of the operations of the postal establishment. It finds that the postal establishment performs many functions which are justified only as being in the interest of the national welfare (§ 102(4), 39 U.S.C. 270(4)) and that it would be unfair to compel any user or class of users of the mails to bear the expenses incurred by reason of special rate considerations granted or facilities provided to other users (§ 102(5), 39 U.S.C. 270(5)). The section concludes with a finding that an immediate declaration of Congressional policy regarding the postal establishment is necessary in the public interest as the basis for the creation and maintenance of a sound and equitable postal-rate structure (§ 102(6), 39 U.S.C. 270(6)).

These findings do not state policy, but merely state the reasons why Congress considered a statement of policy desirable. The Senate Report² clearly shows what the Act was intended to accomplish:

“Enactment of this policy declaration will establish for the first time in over 100 years a comprehensive set of ground rules to serve as a guide for the Congress in its rate making legislation and for the Post Office Department in making its recommendations to the Congress.”

Nowhere in the legislative history is there any statement to the effect that Congress intended the Act to waive sovereign immunity from suit in any respect, nor is such an intention expressed or implied in the Act

Following the findings is Section 103 of the Act, 39 U.S.C. Sec. 270a. This is a declaration of policy, in subsection (a)

² Sen. Rep. 1321, 85th Cong., 2d Sess.; U.S. Code, Cong. and Ad. News, 1958, p. 2503.

of which Congress "emphasizes, reaffirms, and restates its function * * * of forming postal policy." Subsection (b) declares it to be the policy of Congress (1) that the Post Office is a public service; (2) to provide a more stable basis for the postal rate structure through the establishment of general principles, standards and related requirements with respect to the determination and allocation of postal revenues and expenses; and (3) to provide a means whereby that structure may be fixed and adjusted in accordance with those principles "by action of the Congress" (not by that of the Postmaster General) from time to time in the light of studies and reports required to be made to it by the Postmaster General, 39 U.S.C. 270a(b). The general principles referred to in subsection (b) are set forth in 270a(c). They are a statement of general considerations to be used for future rate-making legislation. As stated in the preceding subsection they are to be used in relation to actions of the Congress itself in fixing and adjusting the rate structure from time to time. Included in these general principles and standards is the statement that first-class mail constitutes a preferred service, and that its rates should cover not only its costs but an "additional amount representing the fair value of all extraordinary and preferential services, facilities and factors relating thereto."

The last-quoted statement is important in this litigation for the reason that appellees read it as an instruction to the Postmaster General to determine this "fair value" and to reduce the amount of expense allocated to parcel post. It is quite evident, however, that there is no basis for such a reading of this clause. Its language and context lead to quite a different conclusion. It appears in a declaration of policy as part of a set of standards to be used by Congress in fixing the rates for *first-class* mail—a class for which Congress alone has always fixed the rates and for which it fixed rates in other legislation enacted concurrently with the Postal Policy Act as part of the same public law, Pub. L. 85-426, Title II.

To draw from this clause the conclusion that the fourth-class rates need not be based on fourth-class costs is to fly

in the face of the congressional mandate, 39 U.S.C. Sec. 247, that the Postmaster General must reform the fourth-class rates if it becomes evident that fourth-class costs will exceed revenues by more than 4%. Since the 4% requirement was passed as part of the same public law—though not as part of the Postal Policy Act—it is inconceivable that a statement of policy respecting first class rates should be read as a direction for the administration of fourth-class. The statement respecting first-class rates means simply that first-class rates should be designed to produce an additional amount of revenue, over and above costs allocated to first-class mail requiring judgment determinations by Congress as to intangible rate-making factors representing the “fair value” of the first-class service and not measurable by cost ascertainment procedures. It was not intended to affect determination of the cost of fourth-class mail, and it is difficult to see how it could do so. Whatever figure Congress might determine to be the “fair value” of first-class mail service, that determination could have no effect on the cost of transmitting fourth-class mail. Congress has never given any indication that the section is to be interpreted as a direction to the Postmaster General in fixing fourth-class rates. On the contrary, the following statement appears in the report of the Appropriations Committee of the present House of Representatives, (H.R. Rep. 1281, 86th Cong., 2d Sess., at page 15):

“The Committee was informed during the hearings that an action has been instituted in the United States District Court for the District of Columbia to set aside the revised parcel post and catalog rates established by the Postmaster General effective February 1, 1960, in which the contention is made that the Postmaster General, in formulating the rate revisions, did not follow certain requirements imposed by the Postal Policy Act of 1958.

“The Committee wishes to emphasize its agreement with the language contained in Senate Report No. 305, 86th Cong. 1st Sess., subsequently approved by the Congress in its action on the Conference Report.

The Committee sees no basis for any claim that provisions of the Postal Policy Act of 1958 relating to the principle that first-class mail is a preferred service affect the allocation of costs for the purpose of fixing fourth-class rates by the Postmaster General."

The next section of the Postal Policy Act, 39 U.S.C. Sec. 270b, defines certain postal services as being public services "for the purposes of this chapter," i.e., for the purposes of the Postal Policy Act. It also authorizes an appropriation of (but it did not appropriate) money equal to the "public service" expenditures "as determined by the Congress in the appropriation act based upon budget estimates submitted to the Congress." Thus, it was Congress which reserved to itself the right to determine the amounts allocable to these public services. When the succeeding Congress enacted the Treasury-Post Office Department Appropriation Act, 1960, P. L. 86-39 (86th Cong., 1st sess.), 73 Stat. 65, it appropriated \$37,400,000 "for payment into the postal revenues for public services, in accordance with Section 104 of the Postal Policy Act of 1958 (39 U.S.C. 270b)." None of this amount was designated to cover any loss on star routes or fourth-class post offices.³

The same is true of the bill recommended this year by the Appropriations Committee of the House.⁴ An appro-

³ The committee reports show that the appropriation was intended to cover public services *other than* the star route and fourth-class post office losses. S. Rep. 305 on H.R. 5805, 86th Cong., 1st sess., pp. 9-11; Conf. Rep. No. 425 on H.R. 5805, 86th Cong., 1st sess., pp. 3-4. The former report states (at p. 11) "Ever since September 24, 1950 the Congress has required fourth-class mail or parcel post to be self-supporting. This recommendation for a public service appropriation does not affect this principle or the manner in which it has been carried out in the last 8 years." It goes on to say that with exceptions not here significant " * * * the committee finds no public service costs attributable to fourth-class mail and believes that the Congress intends that fourth-class mail shall pay for its fully allocated costs." The cited conference report concurred fully.

⁴ H.R. Rep. 1281, 86th Cong., 2d Sess., at p. 15.

priation of \$49,000,000 is recommended, but this is restricted to those public services designated in items (1) and (5) of Section 104 of the Postal Policy Act, 39 U.S.C. 270b (a)(1) and (5), the same items for which the \$37,400,000 was appropriated last year. These items have nothing to do with star routes of third- and fourth-class post offices, which are the only "public service" items here in issue, and they do not relate to parcel post or catalogue mail in any way. Therefore even the appropriation process contemplated in the Act has resulted in nothing requiring the Postmaster General to make allowance for "public service" costs in fixing parcel post and catalogue rates.

Section 270c is the only mandatory portion of the Act and the only part of it that directs the Postmaster General to do anything. It requires him to review the postal rate structure every two years and make recommendations to Congress.

The intention of Congress as to who should carry out the purposes of the Postal Policy Act is clearly revealed in that portion of this section requiring the Postmaster General to include in his reports to Congress:

Such other information as is necessary to enable the Congress, or as may be required by the Congress or an appropriate committee thereof, to carry out the purposes of this chapter.

The remaining section of the Act provides that it "shall not require any downward adjustment in rates of postage on fourth-class mail existing on May 27, 1958," 39 U.S.C. 270d. The only way in which the Act could have led to such a downward revision would have been if Congress had appropriated amounts to cover all or part of those "public services" which relate to fourth-class mail, i.e., star routes and fourth-class post offices. Had this been done, it could have reduced proportionately the costs attributable to fourth-class mail. In such circumstances the Postmaster General might have been required to reduce rates. It was to avoid such a contingency that this section was enacted. The contingency never arose.

Nowhere in the Act, therefore, is there any affirmative direction given to the Postmaster General with respect to the reformation of parcel post rates. Had Congress determined to give him such direction it well knew what language would be appropriate. It used such language in the section of the Act requiring reports, as has already been noted, and it used it in that statute which does in fact direct the Postmaster General to reform the fourth-class rates, 39 U.S.C. Sec. 247. That statute is not part of the Postal Policy Act. By that section he is directed, subject to the consent of the I.C.C. after investigation, to reform the rates if he finds the cost of service under existing rates greater than receipts of revenue therefrom. It was pursuant to this statute that he acted here.

In acting, he was also under a mandate to obey the provisions of 31 U.S.C. Sec. 695 to which attention has already been drawn. (Page 3, *supra*). This statute requires "(1) that the revenues from fourth-class mail service will not exceed by more than 4% the cost thereof, and (2) that the costs of such fourth-class mail service will not exceed by more than 4% the revenues therefrom." The quoted language is an amendment enacted at the same time as the Postal Policy Act. The Conference Report in this legislation,⁵ which report relates also to the Postal Policy Act, says with respect to the above quoted amendment:

The purpose of the amendment proposed by Section 110 of the House bill is to facilitate and assist the operation and administration of the established policy of the Congress that fourth-class mail pay its own way. * * * Existing law * * * directs that the Postmaster General seek an increase in fourth-class mail rates if he finds that fourth-class mail costs will exceed fourth-class mail revenues permanently by any amount.

The amendment as enacted provided for the 4% variance already mentioned.

⁵ Conf. Rep. No. 1760, May 21, 1958, 85th Cong. 2d sess. U.S. Code Cong. & Ad. News 1958, vol. 2, pp. 2541-2.

Thus, it is clear that the Postmaster General, though bound by certain explicit statutory directives, was not affected, in his fixing of rates, by anything in the Postal Policy Act. The situation since the passage of the Act therefore remains the same as before. Appellees in denying that this is a suit against the United States argue that administrative action taken in violation of statutory command means that the administrator has exceeded his statutory power and is, therefore, not shielded from suit by governmental immunity. This argument is irrelevant here because the Postal Policy Act on which they rely contains no statutory command or limitation relating to the Postmaster General's fixing of fourth-class rates. It follows that the complaint should have been dismissed.

II. This is an Unconsented Suit Against the United States.

The decision of this Court in *Doehla Greeting Cards, Inc. v. Summerfield*, 97 App. D.C. 29, 227 F. 2d 44, correctly holds that this type of suit is a suit against the United States, a position which appellees here vigorously deny. The plaintiff in that case, a user of the parcel post, had earlier sued the Postmaster General and the members of the Interstate Commerce Commission as individuals and not in their official capacities to obtain an injunction against an increase in parcel post rates. The District Court had dismissed the complaint (116 F. Supp. 68). Subsequently when the same plaintiff again sued for the same relief naming the defendants in their official capacities the District Court again dismissed. This Court affirmed on the ground that it was an unconsented suit against the United States. The action by the Postmaster General in increasing parcel post rates was held to be the performance of a sovereign function which the courts may not enjoin. Judge Bastian, speaking for a unanimous court, concluded his opinion as follows:

“As this court said in *State of Arizona ex rel. Arizona State Board of Public Welfare v. Hobby*, 94 U.S. App. D.C. 170, 221 F.2d 498, 500:

'Erroneous action taken in the exercise of an admittedly validly delegated power is "inescapably the action of the United States and the effort to enjoin it must fail as an effort to enjoin the United States."' Citing *Larson v. Domestic and Foreign Commerce Corp.*, supra, 337 U.S. at page 703, 69 S.Ct. at page 1468.

"Even though the United States has not been joined formally as a party, we think that its interest is directly involved in the present situation, and any relief given will operate against the sovereign. Hence the suit cannot be maintained."

The same is true here. The same relief is asked and it operates against the sovereign just as much now as then. The mere allegation that the agent has acted wrongfully does not establish that he is not using powers delegated to him by the sovereign. If he is using sovereign powers, the action is that of the sovereign and no suit will lie unless the sovereign has consented, *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 693.

In this instance the statute under which the Postmaster General acted, 39 U.S.C. 247, provides that he "is hereby directed" to reform the rates to insure the receipt of adequate revenue. Beyond question in doing so he exercised the power of the sovereign. Therefore this suit, like *Doehla*, is an unconsented suit against the sovereign unless appellees can show that since the *Doehla* decision Congress has given consent to suits of this type.

This they attempt to do by citing the Postal Policy Act as authority. Their contention is plainly erroneous on the face of the Act itself. Nowhere in it is there a waiver of sovereign immunity, either by way of making any action of the Postmaster General or the Interstate Commerce Commission subject to judicial review, or by a grant of judicial review to any "persons adversely affected or aggrieved." Appellees did not, before the enactment, have the right to sue the United States or its agents, *Doehla*

Greeting Cards v. Summerfield, *supra*, and they do not have it now.

Nor has Congress elsewhere authorized any judicial review of parcel post rate reformations and Interstate Commerce Commission consent reports. Neither 39 U.S.C. 247 nor 31 U.S.C. 695, the two statutes under which the Postmaster General acted here, contains any reference to judicial intervention in or supervision of the rate reformation process.

Plaintiffs allege Secs. 1339, 1331, and 1337 of the Judicial Code, and Sec. 10 of the Administrative Procedure Act, 5 U.S.C. 1009, as giving the District Court jurisdiction.

Section 1339 of the Judicial Code gives the District Courts original jurisdiction of "any civil action arising under any Act of Congress relating to the postal service." This can hardly be intended to set up the District Courts as reviewing authorities for any action that may be taken by anyone under any statute having any connection with the postal service. Rather what must have been meant was that where a statute relating to the postal service requires or permits judicial review then such review may be had in the District Courts rather than, for example, in the State courts or in other federal tribunals, and further that, for purposes of such review the diversity of citizenship and monetary limitations of 28 U.S.C. Secs. 1331 and 1332 do not apply. The question whether Sec. 1339 confers jurisdiction to decide this type of case was before this Court in *Doehla*. It did not then and it does not now.

The same argument applies to appellees' reliance on 28 U.S.C. Sec. 1337, which gives the Court jurisdiction of any civil action or proceeding arising under a statute "regulating commerce or protecting trade and commerce against restraints and monopolies." The predecessor to this section was construed in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297. The Supreme Court in that case pointed out that if absence of jurisdiction of the federal courts meant obliteration of a right created by Congress the inference would be strong that the general jurisdictional grant would apply. But, upon finding that the right there

involved was intended to be protected by the Mediation Board, the Court concluded that the District Courts were without jurisdiction to review the Board's action.

So here. The direction to the Postmaster General to reform rates, 39 U.S.C. Sec. 247, is made subject to the consent of the Interstate Commerce Commission after investigation. No hearing is provided for, either before the Postmaster General or the I.C.C. The consent of the Interstate Commerce Commission is therefore a matter committed by law to agency discretion and neither the jurisdictional sections of the Judicial Code nor the Administrative Procedure Act provide any jurisdictional support for this suit. See *Almour v. Pace*, 193 F. 2d 699, 701 (C.A. D.C. 1951). The plaintiffs in *Doehla* placed similar mistaken reliance on the Administrative Procedure Act.

Neither does there exist any constitutional right which would serve as a basis for the allegation that 28 U.S.C. 1331 gives jurisdiction to the District Courts. Appellees argued in the Court below that they have a constitutional right because the collection by a common carrier of exorbitant charges is a tort and that therefore if the postal establishment were a private carrier their right to reasonable rates would be judicially protected at common law. The answer to this is simply that the Post Office is not a common carrier, but a government agency, the establishment of which is entrusted to the Congress by the Constitution itself. U. S. Const. Art. I, Section 8. There is no common law or other right to the establishment of any particular level of postal rates, or to the maintenance of rates at a level that will enable one to make a profit in his business, or to rates not in excess of the cost of the service, or even to the establishment of "reasonable" rates as that term is used in the law of common carriers. If there were, legislation fixing rates of all classes of mail, and not merely fourth-class, would be subject to constant judicial review in the light of the alleged constitutional limitations.

It is quite evident that unless the Postal Policy Act of 1958 establishes a consent to sue that consent does not exist. The examination of the Act itself undertaken in the pre-

vions section of this brief shows that the Act contains no section giving consent to sue. Such a relinquishment of sovereign immunity should not be implied. Acts designed to give such standing speak clearly,⁶ and do not rely upon judicial construction for a determination of Congressional intent to provide review. Appellees attempt to read such a waiver into the Act but they do so only by selecting disparate subsections which, read in context, fail to show any such waiver. Indeed, the complaint, though it refers to numerous sections and subsections, fails to single out any on which a claim of waiver can reasonably be based. The Act itself and its legislative history are alike bare of any indication that Congress knew that it was enacting such a waiver. This Court should not infer a waiver which Congress has nowhere implied.

Since the United States has not consented to be sued upon such a claim as is stated here, this suit would fail even if the Postmaster General had, as appellees claim, violated mandates laid upon him by Congress in the Postal Policy Act. The decision of this Court in *Doehla Greeting Cards, Inc. v. Summerfield*, *supra*, is therefore fully applicable here. It follows that the complaint should have been dismissed.

III. Since there is No Justiciable Controversy, Appellees Lack Standing to Sue

The complaint makes much of the alleged errors of the Postmaster General and of the I.C.C. It says little as to the invasion of any right. But even were the Government to admit that its agents had erred, appellees would not benefit because they could show no violation of any right of theirs.

The case of *Perkins v. Lukens Steel Co.*, 310 U.S. 113, is squarely in point. There the plaintiffs, a group of steel companies, sued to set aside a prevailing minimum wage

⁶ As, for instance, the Walsh-Healey Public Contracts Act, 41 U.S.C. Sec. 43a; the Communications Act, 47 U.S.C. Sec. 402; the Federal Power Act, 16 U.S.C. Sec. 825.

determination of the Secretary of Labor under the Walsh-Healey Public Contracts Act. An injunction restraining the Secretary of Labor from putting the determination into effect was granted by this Court (Edgerton, J., dissenting). The Supreme Court, reversing, held that no legal rights of the plaintiffs were shown to have been invaded or threatened. The Court said (at page 125):

It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. It is not enough that the Secretary of Labor is charged with an erroneous interpretation of the term 'locality' as an element in her wage determination. Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law. * * *

Yet the steel companies had an immense financial stake in the prevailing minimum wage determination which was the subject of that litigation. That stake was insufficient to confer standing upon them, and appellees' stake here is insufficient for the same reason. They allege no injury to any particular right of their own that can be distinguished from the interest of the public at large in the administration of the law. No one may invoke the power of the courts to review governmental acts if all he can show is that he will suffer in common with people generally. *Massachusetts v. Mellon*, 262 U.S. 447.

Even a specific financial loss to appellees as a result of appellants' action would give no occasion for the exercise of judicial power unless the loss were shown to flow from the invasion of a legally protected right of the appellees or

the violation of a legal duty owed to them. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-9.

It is evident from the complaint here that appellees seek only to vindicate a right they claim is held by all users of the parcel post. The relief they seek would suspend the new parcel post rates not only as to them but as to the public at large. Just such a demand for relief—the suspension of the challenged order not only as to plaintiffs but as to everyone—was made in *Perkins v. Lukens Steel* and the Supreme Court referred to this demand, and to the resulting erroneously issued injunction, to show that no individual right was sought to be protected. It said (at p. 129):

That respondents sought to vindicate such a public right or interest is made apparent both by their prayer that the determination be suspended as to the entire steel industry and by the extent of the injunction granted.

Appellees here, like the plaintiffs in *Perkins v. Lukens Steel, supra*, fail to show any right beyond the public's interest in the administration of the law.

This long-held judicial position, grounded in the constitutional doctrine of separation of powers, is reinforced by practical considerations of great importance. If every user of the parcel post is entitled to seek judicial review of every reformation of rates by the Postmaster General, the courts would become clogged with matters representing a new concept of judicial controversies. Cf. *Massachusetts v. Mellon*, 262 U.S. 447.

Appellees here have suffered no legal wrong because they had no right to any particular level of parcel post rates, or to any particular method of fixing them. The delegation by Congress to the Postmaster General of the duty to fix these rates does not give rise to a right on their part, any more than the delegation to the Secretary of Labor of the duty to fix prevailing minimum wages created a right in the plaintiffs in *Perkins v. Lukens Steel, supra*, to challenge his determination.

Appellees have neither a common law right nor a right specifically created by statute for their benefit. The courts are not given general supervision over the administrative functions of the executive branch. It is only when a plaintiff can first establish that some legal interest of his own—personal to him and recognized by law—has been violated that a justiciable controversy comes into existence. *Alabama Power Co. v. Ickes*, 302 U.S. 464; *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118; *Kansas City Power and Light Co. v. McKay*, 96 App. D.C. 273, 225 F.2d 924, 931 (App. D.C. 1955), cert. den. 350 U.S. 884. Therefore the question of whether the Postmaster General, in fixing fourth-class rates, must take the terms of the Postal Policy Act into consideration is not a justiciable issue which the Court can determine.

There being no justiciable controversy here, the complaint should have been dismissed.

CONCLUSION

The order appealed from should be reversed.

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APPENDIX OF STATUTES INVOLVED

39 U.S.C. Sec. 247. *Reformation of classification, etc.* The classification of articles mailable, as well as the weight limit, the rates of postage, zone or zones, and other conditions of mailability under sections 240, 293, and 294 of this title if the Postmaster General shall find on experience that they or any of them are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater than the receipts of the revenue therefrom, he is hereby directed, subject to the consent of the Interstate Commerce Commission after investigation, to re-form from time to time such classifications, weight limit, rates, zone or zones or conditions, or either, in order to promote the service to the public or to insure the receipt of revenue from such service adequate to pay the cost thereof. Feb. 28, 1925, c. 368, Sec. 207, 43 Stat. 1067, as amended May 29, 1928, c. 856, Sec. 7, 45 Stat. 942.

31 U.S.C. Sec. 695. *Post Office Department appropriations; conditions precedent to withdrawal from general fund of Treasury.*

Hereafter, none of the funds appropriated to the Post Office Department from the general fund of the Treasury shall be withdrawn from the Treasury until the Postmaster General shall certify in writing that he has requested the consent of the Interstate Commerce Commission to the establishment of such rate increases or other reformatations (in addition to any specific increases or other reformatations heretofore or hereafter authorized or prescribed by law), pursuant to the provisions of section 247 of Title 39, as may be necessary to insure (1) that the revenues from fourth-class mail service will not exceed by more than 4 per centum the costs thereof and (2) that the costs of such fourth-class mail service will not exceed by more than 4 per centum the revenues therefrom: *Provided*, That the foregoing shall not be construed to require any increase in the postage rate, established by section 293c of Title 39, for publications or records furnished to a blind person. As

amended May 27, 1958, Pub. L. 85-426, Title II, Sec. 213, 72 Stat. 143.

Postal Policy Act of 1958

(Title I of Public Law 85-426, 85th Congress, H.R. 5836, May 27, 1958, 39 USC §§ 270-270d)

TITLE I—POSTAL POLICY

Short Title

Sec. 101. This title may be cited as the "Postal Policy Act of 1958".

Findings

Sec. 102. The Congress hereby finds that—

(1) the postal establishment was created to unite more closely the American people, to promote the general welfare, and to advance the national economy;

(2) the postal establishment has been extended and enlarged through the years into a nationwide network of services and facilities for the communication of intelligence, the dissemination of information, the advancement of education and culture, and the distribution of articles of commerce and industry. Furthermore, the Congress has encouraged the use of these broadening services and facilities through reasonable and, in many cases, special postal rates;

(3) the development and expansion of these several elements of postal service, under authorization by the Congress, have been the impelling force in the origin and growth of many and varied business, commercial, and industrial enterprises which contribute materially to the national economy and the public welfare and which depend upon the continuance of these elements of postal service;

(4) historically and as a matter of public policy there have evolved, in the operations of the postal establishment authorized by the Congress, certain recognized and accepted relationships among the several classes of mail. It is clear, from the continued expansion of the postal service and from the continued encouragement by the Congress of the

most widespread use thereof, that the postal establishment performs many functions and offers its facilities to many users on a basis which can only be justified as being in the interest of the national welfare;

(5) while the postal establishment, as all other Government agencies, should be operated in an efficient manner, it clearly is not a business enterprise conducted for profit or for raising general funds, and it would be an unfair burden upon any particular user or class of users of the mails to compel them to bear the expenses incurred by reason of special rate considerations granted or facilities provided to other users of the mails, or to underwrite those expenses incurred by the postal establishment for services of a non-postal nature; and

(6) the public interest and the increasing complexity of the social and economic fabric of the Nation require an immediate, clear, and affirmative declaration of congressional policy with respect to the activities of the postal establishment including those of a public service nature as the basis for the creation and maintenance of a sound and equitable postal-rate structure which will assure efficient service, produce adequate postal revenues, and stand the test of time.

Declaration of Policy

Sec. 103. (a) The Congress hereby emphasizes, reaffirms, and restates its function under the Constitution of the United States of forming postal policy.

(b) It is hereby declared to be the policy of the Congress, as set forth in this title—

(1) that the post office is a public service;

(2) to provide a more stable basis for the postal-rate structure through the establishment of general principles, standards, and related requirements with respect to the determination and allocation of postal revenues and expenses; and

(3) in accordance with these general principles, standards, and related requirements, to provide a

means by which the postal-rate structure may be fixed and adjusted by action of the Congress, from time to time, as the public interest may require, in the light of periodic reviews of the postal-rate structure, periodic studies and surveys of expenses and revenues, and periodic reports, required to be made by the Postmaster General as provided by section 105 of this title.

(c) The general principles, standards, and related requirements referred to in subsection (b) of this section are as follows:

(1) In the determination and adjustment of the postal-rate structure, due consideration should be given to—

(A) the preservation of the inherent advantages of the postal service in the promotion of social, cultural, intellectual, and commercial intercourse among the people of the United States;

(B) the development and maintenance of a postal service adapted to the present needs, and adaptable to the future needs, of the people of the United States;

(C) the promotion of adequate, economical, and efficient postal service at reasonable and equitable rates and fees;

(D) the effect of postal services and the impact of postal rates and fees on users of the mails;

(E) the requirements of the postal establishment with respect to the manner and form of preparation and presentation of mailings by the users of the various classes of mail service;

(F) the value of mail;

(G) the value of time of delivery of mail; and

(H) the quality and character of the service rendered in terms of priority, secrecy, security, speed of transmission, use of facilities and manpower, and other pertinent service factors.

(2) The acceptance, transportation, and delivery of first-class mail constitutes a preferred service of the postal establishment and, therefore, the postage for first-class mail should be sufficient to cover (A) the entire amount of the expenses allocated to first-class mail in accordance with this title and (B) an additional amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto.

(3) Those services, elements of service, and facilities rendered and provided by the postal establishment in accordance with law, including services having public service aspects, which, in whole or in part, are held and considered by the Congress from time to time to be public services for the purposes of this title shall be administered on the following basis:

(A) the sum of such public service items as determined by the Congress should be assumed directly by the Federal Government and paid directly out of the general fund of the Treasury and should not constitute direct charges in the form of rates and fees upon any user or class of users of such public services or of the mails generally; and

(B) nothing contained in any provision of this title should be construed as indicating any intention on the part of the Congress (i) that such public services, or any of them, should be limited or restricted or (ii) to derogate in any way from the need and desirability thereof in the public interest.

(4) Postal rates and fees shall be adjusted from time to time as may be required to produce the amount of revenue approximately equal to the total cost of operating the postal establishment less the amount deemed to be attributable to the performance of public services under section 104(b) of this title.

Identification of and Appropriations for Public Services

Sec. 104. (a) The following shall be considered to be public services for the purposes of this title—

(1) the total loss resulting from the transmission of matter in the mails free of postage or at reduced rates of postage as provided by statute, including the following:

(A) paragraph (3) of subsection (a) of section 202 of the Act of February 28, 1925 (39 U.S.C. 283 (a)(3)), relating to reduced rates of postage on newspapers or periodicals of certain nonprofit organizations;

(B) sections 5 and 6 of the Act of March 3, 1877 (39 U.S.C. 321), relating to official mail matter of the Pan American Union sent free through the mails;

(C) section 25 of the Act of March 3, 1879, as amended (39 U.S.C. 286), and subsection (b) of section 2 of the Act of October 30, 1951 (39 U.S.C. 289a (b)), relating to free-in-county mailing privileges;

(D) the Act of April 27, 1904 (33 Stat. 313), the last paragraph under the heading "Office of the Third Assistant Postmaster General" contained in the first section of the Act of August 24, 1912 (37 Stat. 551), and the Joint Resolution of June 7, 1924 (43 Stat. 668; Pub. Res., No. 33, Sixty-eighth Congress), as contained in the Act of October 14, 1941 (55 Stat. 737; Public Law 270, Seventy-seventh Congress), and as further amended by the Act of September 7, 1949 (63 Stat. 690), relating to free postage and reduced postage rates on reading matter and other articles for the blind (39 U.S.C. 331);

(E) the Act of February 14, 1929 (39 U.S.C. 336), granting free mailing privileges to the diplomatic corps of the countries of the Pan American Postal Union;

(F) the Act of April 15, 1937 (39 U.S.C. 293c), granting reduced rates to publications for use of the blind;

(G) the Act of June 29, 1940 (39 U.S.C. 321-1), granting free mailing privileges to the Pan American Sanitary Bureau;

(H) the Act of May 7, 1945 (59 Stat. 707), and other provisions of law granting free mailing privileges to individuals;

(I) the second and third provisos of subsection (a) of section 2 of the Act of October 30, 1951 (65 Stat. 672; 39 U.S.C. 289a (a)), granting reduced second-class postage rates to publications of certain organizations;

(J) the last proviso of section 3 of the Act of October 30, 1951 (65 Stat. 673; 39 U.S.C. 290a-1), granting reduced third-class postage rates to certain organizations;

(K) section 302 of The Federal Voting Assistance Act of 1955 (5 U.S.C. 2192), granting free postage, including free airmail postage, to post cards, ballots, voting instructions, and envelopes transmitted in the mails under authority of such Act; and

(L) section 204 (d) and (e) of the Postal Rate Revision and Federal Employees Salary Act of 1948, as amended (39 U.S.C. 292a (d) and (e)), including the amendment made by section 206 of this Act.

(2) the loss resulting from the operation of such prime and necessary public services as the star route system and third- and fourth-class post offices;

(3) the loss incurred in performing nonpostal services, such as the sale of documentary stamps for the Department of the Treasury;

(4) the loss incurred in performing special services such as cash on delivery, insured mail, special delivery, and money orders; and

(5) the additional cost of transporting United States mail by foreign air carriers at a Universal Postal Union rate in excess of the rate prescribed for United States carriers.

(b) There is hereby authorized to be appropriated to the revenues of the Post Office Department for each fiscal year from any money in the Treasury not otherwise appropriated an amount, which shall be deemed to be attributable to the public services enumerated under subsection (a) of this section, equal to the total estimated expenditures of the Post Office Department for the year for such public services as determined by the Congress in the appropriation Act based upon budget estimates submitted to the Congress. Such appropriations shall be available to enable the Postmaster General to pay in to postal revenues at quarterly or other intervals such sums as may be necessary to reimburse the Post Office Department for such amount attributable to public services.

Reviews, Studies, Surveys, and Reports of Postmaster General:

Sec. 105. (a) The Postmaster General is authorized and directed to initiate and conduct, through the facilities of the postal establishment, either on a continuing basis or from time to time, as he deems advisable, but not less often than every two years, a review of the postal-rate structure and a study and survey of the expenses incurred and the revenues received in connection with the several classes of mail, and the various classes and kinds of services and facilities provided by the postal establishment, in order to determine, on the basis of such review, study, and survey for each class and kind of service or facility provided by the postal establishment, the need for adjustment of postal rates and fees in accordance with the policy set forth in this title.

(b) The Postmaster General shall submit to the Senate and the House of Representatives not later than April 15 of each alternate fiscal year, beginning with the fiscal year ending June 30, 1960, a report of the results of the review, study, and survey conducted pursuant to subsection (a) of this section. Such report shall include—

(1) information with respect to expenses and revenues which is pertinent to the allocation of expenses and the determination and adjustment of postal rates and fees in accordance with the policy set forth in this title; and

(2) such other information as is necessary to enable the Congress, or as may be required by the Congress or an appropriate committee thereof, to carry out the purposes of this title.

Effect on Fourth-Class Mail Rates

Sec. 106. The provisions of this title shall not require any downward adjustment in rates of postage on fourth-class mail existing on the date of enactment of this Act.

APPELLEES' BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA ~~Circuit~~ *United States Court of Appeals*
For the
District of Columbia Circuit

No. 15,591

FILED

APR 5 1960

Joseph W. Stewart
CLERK

ARTHUR E. SUMMERFIELD, ET AL., Appellants,

v.

PARCEL POST ASSOCIATION, INC., ET AL., Appellees

**On Appeal from an Order of the United States District Court
for the District of Columbia**

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QUESTION PRESENTED

In the opinion of appellees, and of the District Court, the *controlling* question presented here is whether the Postal Policy Act of 1958 is applicable to the reformation of parcel post and catalog rates by the Postmaster General.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,591

ARTHUR E. SUMMERFIELD, individually and as Postmaster General, and KENNETH H. TUGGLE, CLYDE E. HERRING, ANTHONY F. ARPAIA, HOWARD G. FREAS, JOHN H. WINCHELL, EVERETT HUTCHINSON, RUPERT L. MURPHY, LAURENCE K. WALRATH, DONALD P. MCPHERSON, JR., ABE MCGREGOR GOFF, CHARLES A. WEBB, individually and as members of the INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

PARCEL POST ASSOCIATION, INC., HENRY FIELD SEED AND NURSERY Co., INC., POPULAR MERCHANDISE Co., INC., and WILSON CHEMICAL Co., INC., *Appellees*.

On Appeal from an Order of the United States District Court
for the District of Columbia

APPELLEES' BRIEF

STATEMENT OF POINTS

1. The District Court was correct in holding that the Postal Policy Act of 1958 is applicable to the fixing of parcel post and catalog rates by the Postmaster General.

2. If the District Court was correct on this point, then appellants cannot succeed on their remaining points which depend on this point. If the Postal Policy Act of 1958 is applicable, then—

a. No specific statutory provision for review of fourth-class rate reformations is necessary to sustain this suit.

b. Appellees have standing to sue and a justiciable controversy is therefore presented.

COUNTERSTATEMENT OF THE CASE

Appellees desire to add to appellants' statement that, since this appeal arises from the denial of a motion to dismiss, the following allegations of the complaint must be considered to be admitted:

1. In formulating the parcel post and catalog rates in question here, the appellant Summerfield gave no effect to the Postal Policy Act of 1958 because he was of the view that the Act was not applicable to his fixing of fourth-class mail (parcel post and catalogs) rates. (Complaint, par. 19, J.A. 8-9)

2. Early in the ICC proceedings, appellees moved to dismiss appellant Summerfield's rate schedule on the ground that it had been formulated in contravention of the Postal Policy Act. This petition was denied by the appellant Commissioners. (Complaint, pars. 20, 24, J.A. 10-11)

3. Appell^{EEs}~~ants~~ appeared at the ICC hearing and opposed the rate increases. (Complaint, par. 21, J.A. 10) During the course of the hearing the ICC examiner issued an order stating that "the Department is requested to furnish to the Commission and to protestants' [including appellees'] cost consultants, on or before April 15, 1959, the best data obtainable to determine the cost of the 'extraordinary and preferential services and facilities accorded first-class mail,' which protestants contend should not be included in the cost of the fourth-class mail, and to determine the loss,

if any, from the operation of the star route system and third- and fourth-class post offices." When the appellant Summerfield refused to comply with this order, the appellant Commissioners made no further effort to achieve compliance, despite requests by appellees that they do so. (Complaint, par. 22, J.A. 11)

4. The appellant Commissioners' report consenting to the rate schedule indicates their view that the Postal Policy Act is applicable. Yet they gave no effect whatever to its provisions. (Complaint, par. 24, J.A. 11)

SUMMARY OF ARGUMENT

A. The Postal Policy Act states that one of its purposes is to provide new "standards" for the "allocation of postal revenues and expenses". Among the new standards are: (1) Users of classes of mail other than first-class should not be charged with any of the additional amount of costs incurred for the special facilities used in providing expedited or "preferred service" to first-class mail; and (2) No mail users should be charged with the losses sustained on activities which are classified as "public services" in the Act.

Both the plain language and the legislative history show that these new standards are applicable to the fixing of fourth-class mail rates by the Postmaster General. The Act therefore established a right in appellees to have their rates established in accordance with these standards.

B. The appellant Summerfield gave no effect to the Act, or to these or any other pertinent standards contained in the Act in setting the rates in question here.

The appellant Commissioners, while apparently believing the Act to be applicable, gave no effect to its provisions. The appellants thereby violated appellees' right.

C. The question whether this particular action is a suit against the United States is dependent upon the terms of

the Postal Policy Act. Since the Act is applicable, and since the complaint alleges that appellants contravened its express provisions, appellants exceeded their statutory power. Their action was therefore not that of the United States and no consent for this suit need be found in the Postal Policy Act or anywhere else.

Jurisdiction of suits such as this is provided in the general provision of the Judicial Code authorizing jurisdiction "of any civil action arising under any Act of Congress relating to the postal service." (28 U.S.C. § 1339)

D. Since the Postal Policy Act gave fourth-class mail users a right to have their rates fixed by the Postmaster General in accordance with its standards, appellees have standing to sue. Appellees were parties to the ICC proceeding, and they have a large pecuniary interest in the rates because they deliver their goods by parcel post, the cost of which forms a large proportion of their overall business expense. The impact of the rates upon them is therefore sufficient to give them standing.

ARGUMENT

This is an interlocutory appeal under 28 U.S.C. § 1292(b) as amended in 1958 (72 Stat. 1770). The "controlling question", within the meaning of § 1292(b), as stated by the District Court, is "whether the Postal Policy Act of 1958 is applicable to the reformation of parcel post and catalogue rates by the Postmaster General". (J.A. 119) Having secured a grant of their application for an interlocutory appeal to consider this question, appellants now seek to expand the scope of review by bringing in other questions.

The first sections of appellees' brief (I, II and III) are devoted to a discussion of the controlling question. The remainder (IV and V) is devoted to the other questions.

I. THE POSTAL POLICY ACT IS APPLICABLE AND IT THEREFORE CREATED A RIGHT IN APPELLEES TO HAVE THEIR RATES FIXED PURSUANT TO ITS STANDARDS.

Appellees contend that the Postal Policy Act created new rights in fourth-class mail users—rights to be relieved of charges to them which are prohibited by the Act's cost allocation standards. The Act states that one of its purposes is to provide new "standards" for the "allocation of postal revenues and expenses." [§ 103(b)(2), 39 U.S.C. § 270a (b)(2)]

Two of the new "standards" are as follows:

1. That users of classes of mail other than first-class should not be charged with any of the additional amount of costs incurred for the special facilities used in providing expedited or "preferred service" to first-class mail. These special facilities include, for example, railroad post office cars which contain letter-sorting space and which are placed on passenger rather than freight trains, all for quicker delivery of first-class mail.

2. That no mail users should be charged with the losses sustained on activities which are classified as "public services" in the Act. These public services include, for example, the carrying of mail free for the blind, the operation of small country post offices (called third- and fourth-class post offices), and the transportation and delivery of mail by contract carriers on certain rural and other routes (called star routes).

• • •

With the clear intention of creating a right in mail users of any class to be free of charges for special rates or facilities granted to another class, Congress declared:

"[I]t would be an *unfair burden* upon *any particular user or class of users of the mails* [thus including fourth-class mail users] to compel them to bear the expenses incurred by reason of *special rate considerations granted* [for example, on mail for the blind], or

facilities provided [for example, to expedite first-class mail] to *other* users of the mails . . . " [§ 102(5), 39 U.S.C. § 270(5)]. (Emphasis added)

This section establishes the general principle that it is "unfair" to charge fourth-class mail users with costs incurred primarily to provide "special rates" or "special . . . facilities" to other mail users. Later sections of the Act specify more precisely the charges which Congress thought to be "unfair":

A. *First-class preference provisions.* Section 103(c)(2) of the Act specifically declares first-class mail to be a "preferred service of the postal establishment" and requires, for rate-making purposes, the allocation to *first-class* (not to the other classes) of the following costs:

"(a) the entire amount of the expenses allocated to first-class mail in accordance with this title and (b) *an additional amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto.*"¹

Under postal practice and regulations, first-class mail is given "priority of service" over fourth-class mail.² Large city post offices are operated around the clock to give first-class mail preferred service. "If it were not necessary to expedite first-class mail, post offices could be operated on an 8-hour day, following the practice in industry".³ Spe-

¹ 39 U.S.C. § 270a(c)(2) (Emphasis added).

² In the distribution of outgoing mail in post offices, for example, the regulations require that first-class mail "*must be given priority of service at all times. Primary distribution must be completed within 15 minutes after the time shown in the postmark . . .*" Postal Manual, par. 333.321b (emphasis added).

The regulations applicable to fourth-class contain no statement that this class be given priority. They state simply: "Distribute as soon as practicable after receipt . . ." *Id.* at par. 333.321e.

³ Testimony of the then Deputy Postmaster General Maurice H. Stans in *Postal Rates*, Hearings before a Subcommittee of the Senate Committee on Post Office and Civil Service, 85th Cong., 1st and 2d Sess., on HR 5836, et al., p. 30 (1958).

cial railroad post office cars and highway post office trucks "are set up solely for the purpose of expediting the delivery of first-class mail", although other classes of mail are also handled on them when there is room.¹ Numerous other transportation and delivery facilities are designed primarily to provide the "preferred service" or "priority" to first-class mail which is required by the Postal Policy Act.²

Because of the different degrees of priority given to the classes of mail, Section 103(c)(1)(H)³ of the Postal Policy Act states that "due consideration should be given" in ratemaking to the quality of service rendered in terms of "priority" as between the different classes of mail. This is one of the "standards" for the allocation of expenses among the classes applicable in any "adjustment of the postal-rate structure." [§ 103(c)(1), 39 U.S.C. § 270a(c)(1)]

The Postal Policy Act thus (1) reaffirms that first-class mail is the "preferred service"; (2) requires the allocation to it of all expenses which it would normally receive plus an "additional amount" of expenses representing the value of its preferred service; (3) requires that the difference in "priority" between first- and fourth-class should be considered in fourth-class rate adjustment proceedings; and (4) declares that "it would be an unfair burden" on fourth-class patrons to compel them to contribute to any of the "special facilities" necessary to give first-class patrons preferred service.

By declaring it "unfair" to charge fourth-class mail with any of the "additional amount" incurred to provide the "special facilities" necessary to give first-class mail "preferred service", Congress clearly created a *right* in fourth-class mail users to be free of such charges.

¹ *Ibid.*

² *Ibid.*

³ 39 U.S.C. § 270a(c)(1) (H).

B. *Public service provisions.* Section 104(a) of the Act specifies a long list of "public services" for which regular fourth-class mail patrons cannot be charged. Among them are the special facilities which are particularly pertinent here. The section states [§ 104(a), 39 U.S.C. § 270b(a)]:

"The following *shall* be considered to be public services for the purposes of this title—

* * *

(2) *the loss resulting from the operation of such prime and necessary public services as the star route system and third- and fourth-class post offices . . .*" (emphasis added)¹

According to the Act, the dollar amount of items which have been "determined by the Congress" to be "public service items" "should not constitute direct charges in the form of rates and fees upon *any user or class of users* of such public services, or of the mails generally; [thus including fourth-class mail users]." [§ 103(c)(3)(A), 39 U.S.C. § 270a(c)(3)(A). (Emphasis added)]

It is clear that the statute (1) establishes certain activities which "shall" be considered "public services" including, for example, the losses incurred in the operation of "third- and fourth-class post offices", and (2) states that these "losses" "should not constitute direct charges in the form of rates and fees" upon *any* mail users.

By these provisions, Congress clearly created a *right* in fourth-class mail users to be free of such charges.

C. *Application of these provisions to fourth-class mail rate adjustment proceedings.* The various provisions of the Postal Policy Act quoted above apply, by their terms, to "any particular user or class of users of the mails", and

¹ The star route system is composed of mail transportation and delivery routes operated by independent contractors, many of which serve rural areas. Third- and fourth-class post offices are small post offices usually found in rural areas.

to "any user or class of users . . . of the mails", thereby encompassing fourth-class mail patrons. Moreover, Congress was clearly aware that the plain meaning of its language required the application of the Act to fourth-class mail, and it clearly expected that the result of so applying the Act would be a *reduction*, not an increase, in fourth-class mail rates, for, in Section 106, Congress stated:

"The provisions of this title [the Postal Policy Act] shall not require any *downward* adjustment in rates of postage on *fourth-class mail* existing on the date of enactment of this Act." [39 U.S.C. § 270d (Emphasis added)]

Thus, the Congress intended the Act to apply to fourth-class mail and *was aware that an application of it to determine fourth-class costs at the time of enactment (1958) would require a significant downward adjustment of fourth-class mail rates.* To prevent an immediate *decrease* in fourth-class rates, Congress added Section 106, just quoted. It obviously did not intend an immediate *increase* in these rates.¹ Yet the new rates, which are based on fiscal 1957 cost levels (with certain adjustments), increase the old rates by \$88 million.

D. Legislative history of these provisions. When the parcel post service was created in 1912, Congress gave the Postmaster General the authority to reform parcel post

¹ The Conference Report states:

"Section 106 . . . is not intended to create any inference that a *downward* adjustment may not be made in the *future* in the rates of postage on fourth-class mail." [H.R. Rep. No. 1760, 85th Cong., 2d Sess., p. 56 (1958) (Emphasis added).]

Senator Johnston, senior member of the Senate Conference and chairman of the Senate Committee on Post Office and Civil Service, stated during Senate consideration of the conference report, that Section 106 was added *to keep fourth-class mail rates stable* at their present level for a reasonable period because "it was believed that users of the mail have the *right* to know exactly what their rates of postage will be for a reasonable future period of time." [See 104 Cong. Rec. 9188 (Emphasis added).]

rates, "subject to the consent of the Interstate Commerce Commission after investigation." (Act of August 24, 1912, 37 Stat. 558). The two standards given in the 1912 Act for rate reformatations were so broad as to be almost meaningless: "[1] to promote the service to the public or [2] to insure the receipt of revenue from such service adequate to pay the cost thereof."

Immediately after enactment, the ICC stated: "The act provides no standard or rule of action for the Commission." (ICC Annual Report, 1913, p. 80.) For this reason, the Commission recommended to Congress that it "be relieved of all duties in connection with the parcel post" or that its duties and the standards applicable thereto "be more clearly stated." (*Ibid.*)

After Congress failed to clarify the standards, the Postmaster General adopted a cost allocation system for the purpose, among other things, of defining the "revenue" and "cost" of fourth-class mail.¹ This was utilized to give meaning to the second standard established by Congress: "to insure the receipt of *revenue* from such service adequate to pay the *cost* thereof." (Emphasis added.) The new allocation procedure was called the Cost Ascertainment System. It allocated costs of facilities which were jointly used by the different classes of mail to each class depending on how much each used the facility, without regard to whether the facility was designed primarily for one class and not the others, and without regard to whether the facility was used to provide preferred service to one class and secondary service to others.² The procedures incorporated in the Cost Ascertainment System were used without substantial change for over thirty years for the

¹ See *Postal Rates and Postal Policy of the Post Office Department*, Report of the Advisory Council to the Senate Committee on Post Office and Civil Service, 83rd Cong., 2d Sess., p. 243 (1954).

² *Id.* at pp. 21, 249-250. See also the testimony of Maurice H. Stans, cited *supra*, at p. 6, note 3, pp. 29-30.

formulation of fourth-class mail rates, including those at issue here.

In 1954, the Senate Post Office and Civil Service Committee's Advisory Council issued a report on postal rates and policies which became known as the "Carlson" report in honor of the then chairman of the Committee, Senator Carlson.¹ This report stated:

"The cost-ascertainment system allocates by statistical means the revenues and expenditures to the several classes of mail on the assumption that each class is as responsible for all of the existing facilities as any other class. It presumes that since many of the facilities must of necessity be used jointly, it is proper to charge each class with its relative share of the use of the facilities. This system, therefore, cannot reflect the fact that the majority of the facilities have been acquired to accommodate the specific needs of first-class mail.

* * * *

"If the facilities were designed simply for the most economical handling of the mail rather than for convenience and service, the operating costs would be greatly diminished. Thus, although the facilities are jointly used, it is unreasonable to ask the secondary classes to assume a prorata share of costs which would be far less if the facilities were designed to handle the secondary classes alone." (Emphasis added.)

The Carlson report criticized the rate-making standards which were used by the Postmaster General and the ICC in fixing fourth-class rates, and it suggested a reallocation of costs from second-, third- and fourth-class mail to first-class mail.² A study prepared by Price Waterhouse and included in the Carlson report showed the approximate reallocation of costs to first-class from the other three

¹ *Postal Rates and Postal Policy of the Post Office Department, Report of the Advisory Council to the Senate Committee on Post Office and Civil Service, 83rd Cong., 2d Sess., p. 21 (1954).*

² *Id.* at pp. 282, 21, 36-39, 249-250.

classes which should result from an assumption that the basic purpose of the Department was to carry first-class.¹ This reallocation removed \$276 million from fourth-class costs.

When the Department later submitted a postal policy bill to Congress, it accepted only a portion of the Carlson report's recommendations. Following the Carlson recommendations, the Department's bill, later passed by the House with little change, stated that first-class mail was a "preferred service" of the Department and required that it be charged "(A) the entire amount of the expenses allocated to first-class mail in accordance with this title and (B) *an additional amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto.*"²

Unlike the Carlson report, the Department's bill did *not* recommend any elimination of first-class preference costs from *fourth-class* mail charges, only from second- and third-class. Instead, fourth-class mail was to be allocated costs by the Cost Ascertainment System in the same manner as it had been for years.³ The Department's bill explicitly stated that, in fourth-class rate proceedings before the ICC under 39 U.S.C. §247, fourth-class mail's cost should be that shown by the annual Cost Ascertainment Report, no more and no less.⁴

¹ *Id.* at pp. 26-39, reprinted at J.A. 37-43.

² See H.R. 11380, 84th Cong., 2d Sess., as introduced on May 22, 1956, §§ 203, 205, 208. This bill, with changes not relevant here, was reintroduced on March 11, 1957 as H.R. 5836, 85th Cong., 1st Sess. (1957) and later passed the House.

³ H.R. 5836, as introduced March 11, 1957, 85th Cong., 1st Sess., §§ 203(c)(4), 208.

⁴ Under the bill, "costs" for the purpose of 39 U.S.C. § 247 proceedings were to "have the same meaning as when used in the cost ascertainment report." (*Ibid.*, Emphasis added) Section 205 of this bill provided:

"Sec. 205. (a) For the purposes of this title, revenues and expenses shall be determined and ascertained, and each allocation and apportion-

In explaining these provisions to the Senate Committee on Post Office and Civil Service after their passage by the House, the Department offered figures showing that \$316.3 million should be shifted to first-class mail from second- and third-class (but not fourth-) so that first-class would pay the full measure of its preferred service.¹ The then Deputy Postmaster General, Maurice H. Stans, stated that "first-class mail receives priority in handling *over every other class of mail* in post offices and in transit."² He gave several examples of the special facilities which have been set up primarily to give expedited treatment to first-class mail but which also handle other classes of mail.³ The costs of these special facilities, he said,

"are charged over all the classes of mail on a use basis [by the Cost Ascertainment System]. If the mail service were not geared to the expedited movement of first-class communications, *these costs would not be incurred at all. It is only fair to relieve the other classes of mail of such costs*, and to charge them wholly to first-class mail for ratemaking purposes."⁴

In the Department's bill, as already indicated, only second- and third-class mail were to be relieved of the first-class preference costs which Deputy Postmaster General Stans said should not be charged to "other classes."⁵ After

ment with respect thereto shall be made, *upon the basis of the cost ascertainment system*, to the extent not otherwise indicated in this title.

(b) Nothing in this title shall be construed to affect the *cost ascertainment system* or any authority, power, duty, or procedure of the Postmaster General or of the postal establishment generally, except to the extent necessary to carry out this title." (Emphasis added)

¹ *Postal Rates*, Hearings before a Subcommittee of the Senate Committee on Post Office and Civil Service, 85th Cong., 1st and 2d Sess., on H.R. 5836, et al., pp. 29-31 (1958).

² *Id.* at p. 29 (Emphasis added).

³ *Id.* at p. 30. Part of this testimony is quoted at J.A. 67-69.

⁴ *Ibid.* (Emphasis added).

⁵ *Ibid.*

Mr. Stans' presentation, the Chairman of the Senate Committee, perhaps remembering the Carlson report, expressed difficulty in understanding why *fourth-class* mail should not receive any benefit from the reallocation of costs to first-class mail to cover the first-class preference.¹ The Chairman asked whether fourth-class was given any "better treatment" than second-class which, under the Department's bill, was to receive a large reduction in allocated costs.² Later, he asked again whether fourth-class would receive any benefit in the cost allocation resulting from the Department's preference provisions.³ Mr. Stans replied:

"No, sir. You see that [fourth-class] is the only class of mail on which Congress has ever expressed a specific policy and that is that fourth-class mail should pay its full allocated costs *under the cost ascertainment system.*"⁴

While Mr. Stans' testimony overstates what Congress actually said in the 1912 Act, now 39 U.S.C. §247, it accurately reflects the ICC's past practice of approving any fourth-class rate increase designed to eliminate a deficit shown by the Cost Ascertainment System. Under the Department's bill, this practice would have been written into law. However, because of action taken by this Committee and the Senate after Mr. Stans' testimony, it was not. Towards the end of the Department's presentation the Chairman referred back to the part of Mr. Stans' testimony showing a reallocation of \$316 million to first-class mail from second- and third-class, but not from fourth-class.⁵ He indicated that he thought the "fair thing to do" was to "distribute that [as a credit] back

¹ *Id.* at pp. 74-75.

² *Id.* at p. 75.

³ *Id.* at p. 162.

⁴ *Ibid.* (Emphasis added).

⁵ *Id.* at p. 299.

to second, third *and fourth classes*, you give them some credit for that and balance it off. *You would have to do that . . .*"¹

After this hearing, the Senate Committee *eliminated from the Department's bill the language excepting fourth-class mail from the benefits of the reallocation of costs to first-class mail*. The provisions requiring that fourth-class mail be allocated exactly the cost it incurred on a use basis as shown by the Cost Ascertainment Report were cut out of the bill.² Moreover, a statement in the bill implying that no change was intended in the rate policy applicable to "fourth-class mail" was removed.³ Finally, the Committee added to Section 102(5) the language stating that it would be unfair to charge "any particular user or class of users [e.g., fourth-class patrons]" with expenses incurred by reason of the "special . . . facilities provided to other users of the mails . . . [e.g., first-class patrons]."

Later, after agreement to these new provisions by the Senate and by the House conferees, the conference committee added Section 106, making it crystal clear that all the provisions of the bill designed to produce, for rate-making purposes, a *different* cost allocation than that resulting from Cost Ascertainment, *applied to fourth-class mail*, as well as to second- and third-class. Section 106,

¹ *Ibid.* (Emphasis added).

² Compare H.R. 5836 as it passed the Senate on February 28, 1958 with H.R. 5836 as it passed the House on August 13, 1957. The provisions quoted in footnote 4, p. 12, *supra*, were all eliminated from the bill.

³ H.R. 5836, as passed by the House on August 13, 1957, stated:

"Congress heretofore has not laid down a *firm policy (except for fourth-class mail and certain special services authorized by law)* . . ." (Emphasis added). (See *Postal Rates, supra*, at p. 6.) The bill then went on to state the need for a postal policy which, by implication, *would not apply to fourth-class mail*. See § 202(6). As finally enacted, the statute simply states the need for a congressional policy statement without referring to any existing policy for fourth-class mail. Section 102(6) of the Postal Policy Act.

as indicated above, states that the provisions of the Act "shall not require any *downward* adjustment in the rates of postage on *fourth-class* mail existing on the date of enactment of this Act." (Emphasis added.) If fourth-class had not been already under the Act, this section would, of course, have been wholly unnecessary.

At the same time the Postal Policy Act was adopted, an existing statute applicable only to fourth-class mail was amended. This amendment to 31 U.S.C. §695 prohibits the Postmaster General from withdrawing funds from the Treasury unless he certifies that he has requested the ICC to approve such rate proposals as may be necessary to insure

"(1) that the *revenues* from fourth-class mail service will not exceed by more than 4 per centum the *costs* thereof and (2) that the *costs* of such fourth-class mail service will not exceed by more than 4 per centum the revenues therefrom." [72 Stat. 143 (1958). (Emphasis added)].

This amendment appears in the same enactment (P.L. 85-426) as does the Postal Policy Act. A purpose of the Postal Policy Act was to provide new "standards" for the "allocation of postal *revenues* and *expenses*." [§103(b)(2). (Emphasis added)]. Congress would not have used the words "revenues" and "costs" in another section of the same enactment unless it had intended that the standards established by the Postal Policy Act were to be followed in determining those revenues and costs.

The legislative history of the Postal Policy Act shows clearly that Congress intended the Act to apply to fourth-class mail, and that it intended to create a *right* in fourth-class mail users to be free of all charges for the extra costs incurred to provide the special facilities necessary to give first-class mail preferred service or to provide the public services designated as such in the Act.

II. APPELLANTS HAVE VIOLATED APPELLEES' RIGHT TO HAVE THEIR RATES FIXED PURSUANT TO THE POSTAL POLICY ACT.

The same standards for ratemaking were used to fix the rates now in question as were used to fix fourth-class rates before the enactment of the Postal Policy Act—that is, the instant rates were designed to eliminate the “deficit” between the expenses and revenues allocated to parcel post and catalogs by the old procedures of the Cost Ascertainment System. “Expenses” and “revenues” were determined in exactly the same manner as before even though new standards for their determination had been enacted. Appellees’ right to be free of certain charges made under the old standards was thus ignored.

The complaint alleges that in formulating and promulgating these rates, the Postmaster General did not give *any* effect to the Postal Policy Act of 1958 because he was of the view that the Act was not applicable.¹ The ways in which it is alleged that he violated the Act in formulating the rates are described below with the pertinent provisions of the Act set forth in the footnotes:

(1) The appellant Summerfield did not give due consideration or *any* effect to the priority which first-class mail is given over fourth-class mail in handling and in transport;²

(2) He did not allocate *any* additional amount to first-class mail costs to represent the fair value of extraordinary and preferential services and facilities which first-class mail receives.³

¹ Complaint, par. 19(a), J.A. 8.

² Complaint, par. 19(b), J.A. 8. The Postal Policy Act states that, in “the determination and adjustment of the postal rate structure, *due consideration should be given to . . . (H) the quality and character of the service rendered in terms of priority . . .*” [§ 103(c)(1), 39 U.S.C. § 270a(c)(1) (Emphasis added).]

³ Complaint, par. 19(c), J.A. 9. The Postal Policy Act declares first-class mail (but not fourth-class) to be a “preferred service” and requires, for

(3) He did not reduce the expenses allocated to fourth-class mail to account for the additional amount which should have been allocated to first-class, and he included in the rates an amount representing a share of the cost of the special facilities which are provided by the postal establishment primarily to give first-class mail preferred service;¹

(4) He did not treat the star route system and third- and fourth-class post offices as public services;²

(5) He did not eliminate from the costs allocated to fourth-class mail, and he included in the rates here in question, an amount representing a share of the losses incurred in operating the star route system and third- and fourth-class post offices.³

By establishing rates in contravention of the express commands of the Postal Policy Act, the appellant Summerfield exceeded his statutory power, violated appellees' rights, and rendered his rate proposal wholly void.

ratemaking purposes, the allocation to first-class (but not to fourth-class) of "(A) the entire amount of the expenses allocated to first-class mail in accordance with this title and (B) an additional amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto." [§ 103(c)(2), 39 U.S.C. § 270a(2) (Emphasis added).]

¹ Complaint, pars. 19(d) and (e), J.A. 9. The Postal Policy Act declares it an "unfair burden upon any particular user or class of users of the mails [e.g., fourth-class] to compel them to bear the expenses incurred by reason of special . . . facilities provided to other users of the mails [e.g., first-class] . . ." [§ 102(5), 39 U.S.C. § 270(5) (Emphasis added).]

² Complaint, par. 19(f), J.A. 9. The Postal Policy Act states: "The following shall be considered to be public services for the purposes of this title— . . . (2) the loss resulting from the operation of such prime and necessary public services as the star route system and third- and fourth-class post offices." [§ 104(a), 39 U.S.C. § 270b(a) (Emphasis added).]

³ Complaint, par. 19(h) and (i), J.A. 9. The Postal Policy Act states that the public service items "should not constitute direct charges in the form of rates and fees upon any user or class of users of such public services or of the mails generally". [§ 103(c)(3)(A), 39 U.S.C. § 270a(c)(3)(A) (Emphasis added).]

The ICC's final report recognized the applicability of the Postal Policy Act (J.A. 101). However, the report concluded that the rates would not charge a "substantial proportion" of costs "*which should be allocated, within the meaning of the Postal Policy Act of 1958*" to the "preferred service accorded first-class mail" or to the "public services designated in said Act". (*Ibid.*, emphasis added)

Analysis of the Commission's report shows that this legal conclusion simply interprets the Postal Policy Act as not prohibiting a charge to fourth-class mail for a share (based on the amount of fourth-class use as shown by Cost Ascertainment) of the costs of the "public services" designated as such in the Act, and of the special facilities designed to provide "preferred service" to first-class mail.¹ Indeed, the conclusion could not be a factual one (*i.e.*, that no significant charges for public services or for first-class preference are made to fourth-class mail) because the Postmaster General refused the Commission's request for the "best data obtainable to determine the cost of the 'extraordinary and preferential services and facilities accorded first-class mail,' which protestants contend should not be included in the cost of fourth-class mail, and to determine the loss, if any, from the operation of the star route system and third- and fourth-class post offices."² Without this data, no such factual conclusion could be drawn. Finally, that the conclusion is a legal one—simply an interpretation of the Act which permits such charges to fourth-class mail—is conclusively shown by the following language from the Commission's report:

"Although there is some conflict in the legislative history with respect to these matters, we believe that the allocation of the costs of these operations [third- and fourth-class post offices and the star route system] to fourth-class mail *to the extent that they are used*

¹ Such an analysis is set out at J.A. 28-35.

² Complaint, par. 22, J.A. 11.

thereby is in conformity with the Act." (J.A. 92, emphasis added).

Like the Commission, the court below held the Postal Policy Act to be applicable to the fixing of fourth-class rates by the Postmaster General. (J.A. 118) Judge McGarraghy did not, however, interpret the provisions of the Act, as the Commission did, to sanction a rate schedule which was prepared on the assumption that the Act was not applicable.

Appellants do not rely here on the Commission's interpretation of particular provisions of the Act. Instead, they attack the basic conclusion reached by both the ICC and the court below—that the Act is applicable to fourth-class rate fixing. We submit that the plain language and the legislative history of the Act both show that the Act is applicable to fourth-class rate fixing.

III. APPELLANTS HAVE NO BASIS FOR CONTENDING THAT THE POSTMASTER GENERAL IS "NOT AFFECTED, IN HIS FIXING OF RATES, BY ANYTHING IN THE POSTAL POLICY ACT."

Appellants conclude their argument on the Postal Policy Act with the contention that the Postmaster General

"was not affected, in his fixing of rates, by anything in the Postal Policy Act. The situation since the passage of the Act therefore remains the same as before." (Appts. Mn. Br. 13)

Appellants attempt to support this conclusion by arguing (a) that Congress did not repeal, and in fact reaffirmed, statutory provisions (39 U.S.C. § 247; 31 U.S.C. § 695) requiring fourth-class mail to recover its "cost"; (b) that the Congress placed responsibility for the administration of the Act upon itself, not upon the Postmaster General; and (c) that various appropriations committee reports show that the Act does not affect fourth-class mail. Each of these contentions will be discussed in turn.

A. To say that fourth-class mail must recover its "cost" is to beg the question at issue. It is perfectly true that the statutory standards (39 U.S.C. § 247; 31 U.S.C. § 695) upon which the Postmaster General based his rate schedule require that fourth-class mail "pay its own way" by recovering its "cost" within 4 percent. (Appts. Mn. Br. 12) But this argument begs the essential question, which is: *What "cost" should be allocated to fourth-class?*

The Cost Ascertainment System allocates a share of the cost of each postal facility to fourth-class mail in proportion to the amount of use which fourth-class makes of the facility, without regard to whether the facility was designed primarily to give first-class mail preference, and without regard to whether it is classified as a public service or not.¹ This system produces one set of figures for the "cost" of fourth-class mail. Systems using other cost allocation standards produce wholly different sets of figures for such "cost".² The question of statutory interpretation before this Court is whether Congress, when it used the word "cost", meant the cost produced by the Cost Ascertainment System or the cost produced by the different standards of the Postal Policy Act.

The Act shows on its face that one of its main purposes was to establish "standards" for the "allocation of postal revenues and expenses" to be used in postal ratemaking. [§ 103(b)(2), 39 U.S.C. § 270a(b)(2).] As already shown, these "standards" reject the basic premise of the Cost Ascertainment System, which is that the cost of each postal facility should be charged to all classes of mail which use the facility in proportion to the amount of their use, without regard to whether the facility was designed primarily to give first-class mail preference, and without regard to whether it is classified as a public service. When Con-

¹ See pp. 10-11, *supra*.

² See, e.g., Carlson Report, cited *supra*, note 1, p. 11, at pp. 36-39 (reprinted at J.A. 37-43) See also J.A. 59-60, 63-67, 52-59.

gress provided, in the same enactment which contained the Postal Policy Act, that the Postmaster General must seek fourth-class rates which would produce revenues not more than 4% above or below "cost", Congress must clearly have meant that he follow the standards of the Postal Policy Act, not the Cost Ascertainment System, in determining "cost". [31 U.S.C. § 695] The plain language of the Postal Policy Act, as well as its legislative history, both indicate that Congress intended its rate-making standards to apply to fourth-class mail. (See pp. 8-16, *supra*.)

B. *The Congress did not place sole responsibility for administration of the Act upon itself.* Appellants argue that the provisions of the Postal Policy Act upon which appellees rely were intended solely for the implementation and guidance of Congress itself, not for the Postmaster General. (Appts. Mn. Br. 6-11) This contention simply cannot be accepted, for the following reasons:

(1) Section 106 and other provisions of the Act refer to "fourth-class mail" and to "any particular class" etc. and clearly therefore apply to fourth-class. (See pp. 8-9, *supra*.) Since 1912, fourth-class rates have traditionally been fixed by the Postmaster General with ICC consent. If the provisions of the Act on which appellees rely apply to fourth-class mail rate fixing, but do not bind the Postmaster General in fixing fourth-class rates, then their purpose is wholly obscure.

(2) The Congress which enacted the Postal Policy Act knew that no statute which it enacted could bind later Congresses.¹ If it had meant only to supply future Congresses with its views on how postal rates should be fixed, it might more easily have done so by passing a resolution stating the sense of the Congress. Since it chose instead to enact

¹ See, e.g., *Newton v. Board of County Commissioners of Mahoning County*, 100 U.S. 548, 559 (1880); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932); *Toomer v. Witsell*, 334 U.S. 385, 393; n. 19 (1948).

mandatory legislation, it must have intended that that legislation apply to someone other than itself.

Appellants say, however, that the Act is not mandatory, except for Section 105(b) which states that the Postmaster General "shall" submit certain reports to Congress. [39 U.S.C. § 270c(b), Appts. Mn. Br. 11] But, Section 104(a) declares: "the following *shall* be considered to be public services..." [39 U.S.C. § 270b(a)]. Other provisions state that the public services "*shall* be administered," and postal rates "*shall* be adjusted" in specified ways. [§ 103(c)(3) & (4), 39 U.S.C. § 270a(c)(3) and (4) (emphasis added)]¹

One does not ordinarily give oneself commands of this kind. Congress must have intended that someone other than itself be bound by the Act.

(3) This is confirmed by an action the Senate took to modify the bill drafted by the Post Office Department and passed with little change by the House. This bill contained a statement that the Postal Policy Act "*will serve as a guide in the determination and adjustment by the Congress, from time to time, of the postal-rate structure.*"² The Senate struck this provision from the bill, suggesting that it did not intend the Congress to be the sole agency to which the Act would apply.

(4) Congress did, as appellants contend, place responsibility upon itself to enact an appropriation for "public services" each year. [§ 104(b) of the Act, 39 U.S.C.

¹ Still other language holds it "an *unfair burden*" on one class of mail users to charge them with the cost of the special rates and facilities provided for other classes of mail users. [§ 102(5), 39 U.S.C. § 270(5) (emphasis added)] The Postmaster General can hardly claim the right to exact from mail users charges which Congress itself had declared are "unfair". This provision, like many others in the Act, is therefore mandatory.

² H.R. 5836, 85th Cong., 1st Sess., as it passed the House on August 13, 1957, see the "General Statement" immediately after the enacting clause on p. 2, *Postal Rates*, *supra*, at p. 1 (emphasis added).

§ 270b(b)]. It did not, however, indicate what action was to be taken in the event no appropriation was enacted for public services for the base period used in a fourth-class rate adjustment proceeding. In the instant case, the base year was fiscal 1957, and no public service appropriation has been enacted for that year. Surely Congress could not have intended in such a circumstance that ordinary mail users be charged for activities which it declared "shall be considered to be public services. . . ." [§ 104(a), 39 U.S.C. 270b(a)] To do so would fly in the face of the congressional policy that public services "should not constitute direct charges in the form of rates and fees upon any user or class of users of such public services or of the mails generally." [§ 103(c)(3)(A), 39 U.S.C. § 270a(c)(3)(A)].

(5) Appellants argue that the "additional amount" of costs which appellees contend should be allocated to first-class mail to pay for the preferred service it receives can only be determined by Congress in legislation setting first-class rates. (Appts. Mn. Br. 8-9) However, Congress has already raised first-class rates from 3 cents to 4 cents to bring in an "additional amount" of revenue over the cost allocated to first-class by the Cost Ascertainment System [see Title II, Section 202 of PL 85-426 (1958), 39 U.S.C. § 280]. This was done simultaneously with the enactment of the Postal Policy Act because the Post Office Department urged that first-class should be charged more than its regularly allocated costs in order to pay for the preferred service which it receives.¹ Yet, despite the fact that Congress has prescribed an "additional amount" of charge for first-class, the Postmaster General has not increased the costs allocated to first-class to compensate for its preferred service. (Complaint, par. 19(c), J.A. 9) Nor has he reduced fourth-class mail's cost allocation in recognition of its deferred service. (Complaint, par. 19(b), J.A. 9)

¹ See, e.g., *Postal Rates Hearings* before a Subcommittee of the Senate Committee on Post Office and Civil Service, 85th Cong., 1st and 2nd Sess., on H.R. 5836, et al., pp. 24-31 (1958).

It is perfectly clear from this that the Postmaster General does not regard first-class rate fixing by Congress as determinative of the amount of the extra cost allocable to first-class because of its preference. If he were prepared to follow the theory advanced in appellants' brief—that Congress must determine the "additional amount" of costs to be allocated to first-class for preferred service—then he would have accepted the congressional determination (made by increasing first-class rates from 3 cents to 4 cents) that an additional amount of more than \$300 million in costs should be charged to first-class mail to pay for its preferred service.¹

Instead of shifting these costs to first-class from the other classes, he has allocated them to all classes just as he did before Congress acted. If the instant rate schedule is put into effect, he will collect *twice* for the same preferred service costs—*once from first-class mail users under the 4 cent rate, and once from fourth-class patrons under the new parcel post and catalog schedule.*

C. Appellants' reliance on appropriations committee actions is misplaced. Appellants place great reliance on the reports of the House and Senate Appropriations Committees on the Post Office Department Appropriations for fiscal 1960 and 1961. (Appts. Mn. Br. 9-11 and footnotes 3-4). We concede that language from these reports seems inconsistent with the position we have advanced here. However, they are certainly not the best evidence of the meaning of the Postal Policy Act. They were written *after* the Act was passed and do not represent the contemporaneous views of the Post Office Committees which were primarily responsible for the enactment of the statute in its present form. As we have shown, the actual legislative history of the Act supports our position. (See pp. 8-16, *supra*.)

Moreover, the Appropriations Committee reports were the result of a series of *ex parte* representations made by

¹ *Id.* at p. 25.

the Postmaster General and his staff for the purpose of influencing the decision of the ICC and of the courts. These representations began during Senate hearings on the 1959 Supplemental Appropriations Bill:

"MR. SUMMERFIELD. . . . We will have very shortly before the Interstate Commerce Commission a request for approval of an increase in parcel post rates. It is important that this public service figure be decided upon by the Congress and by this committee to help us in the presentation of the substantial rate increase which we are constrained to establish.

MR. GILLETTE. [Assistant Postmaster General] Mr. Chairman, our General Counsel advises us that it *would greatly facilitate the presentation of our case to have a determination by the Congress as to these public service items since the Public Law 85-426 does state that ratemaking should consider public service items. . . .*

MR. GILLETTE. Mr. Chairman, it may be alleged by those who object to an increase in the parcel post rates that there is a relationship between this determination [i.e., the amount of the public services] and the parcel post rates even though we believe it could be argued that there is no direct relationship. . . ."¹

During these hearings, the Postmaster General asked for a \$171 million public service appropriation for fiscal 1959, an appropriation which was not intended by him to include any amount for the star-route system or third- and fourth-class post offices.² The justification submitted by the Postmaster General represented that the Department "knows of no practicable way of determining what, if any, loss there may be attributable" to these public services.³

¹ See *The Supplemental Appropriations Bill, 1959*, Hearings before the Senate Committee on Appropriations, 85th Cong., 2d Sess., on H.R. 13450, pp. 648-668 (1958) (emphasis added).

² *Id.*, at pp. 650-653.

³ *Id.*, at p. 652.

These are, of course, the main public service activities for which fourth-class mail was to be charged at the impending ICC hearing.

When action on this appropriation request was denied,¹ the Postmaster General made similar presentations with respect to fiscal 1960 to the Appropriations Committees of the House and Senate during the next Congress.² During debates in the Senate, the Chairman of the responsible Senate Appropriations Subcommittee read a letter from the Director of the Bureau of the Budget recommending enactment of a \$36.4 million "public service" appropriation which the committee report said did not contain anything for third- and fourth-class post offices or star routes.³ The letter said, *inter alia*:

"The public service issue has been raised in that case [the ICC parcel post rate case] by opponents of the increase, and its resolution by the Congress would undoubtedly aid the Commission in its deliberations."⁴

The Chairman of the Subcommittee then stated:

"The Postmaster General privately told me about this matter, before the hearings.

* * *

"I do not know how the Department is on record before the Interstate Commerce Commission; but I know that the Postmaster General told me the same thing that the director of the Bureau of the Budget has set forth in the letter I have just read to the Senate."⁵

¹ See Sen. Rep. No. 2350, 85th Cong., 2d Sess. (1958).

² See e.g., *Treasury-Post Office Departments Appropriations for 1960*, Hearings before a Subcommittee of the House Appropriations Committee, 86th Cong., 2d Sess., pp. 44-66 (1959).

³ Sen. Rep. No. 305 on H.R. 5805, 86th Cong., 1st Sess., pp. 9-11 (1959).

⁴ 105 Cong. Rec. 8410 (May 28, 1959—daily ed.).

⁵ *Ibid.*

The appropriations bill for fiscal 1960 was later enacted with an amount of \$37.4 million earmarked for "payment into the postal revenues for public services, in accordance with Section 104 of the Postal Policy Act of 1958 (39 U.S.C. 270(b))."¹

During House hearings on the 1961 appropriations bill, the Postmaster General's staff made a presentation to the House Appropriations Committee concerning the case of *Parcel Post Association v. Summerfield*, but asked that the presentation be off the record.² After this hearing, the Committee issued the report quoted in appellants' brief (pp. 9-10). This report recites the fact that the instant suit was filed, and then states the Committee's agreement with earlier reports recommending against public service appropriations for fiscal 1960 for third- and fourth-class post offices and star routes. The report also sets forth the Committee's view that appellants' first-class preference claim is without basis in the Postal Policy Act.

The reason why this and the prior appropriations committee reports contain the language upon which appellants rely is all too obvious. The Postmaster General has used appropriations proceedings to make *ex parte* representations for the purpose of influencing the outcome of this litigation. The results of these *ex parte* representations are wholly unreliable guides to the interpretation of the Postal Policy Act. Indeed, they form no part of the Act's legislative history whatever.³ They are at best gratuitous

¹ P.L. 86-39, 86th Cong., 1st Sess., 73 Stat. 65 (1959).

² *Treasury-Post Office Departments Appropriations for 1961*, Hearings before the Subcommittee of the House Committee on Appropriations, 86th Cong., 2d Sess., pp. 120-121 (1960).

³ Whether it is appropriate for members of an executive department to make *ex parte* and off-the-record representations to the Congress for the purpose of influencing the outcome of pending litigation over rates before independent agencies and the courts is a matter which can best be determined by this Court. Cf. *WKAT, Inc. v. FCC*, 103 App. D. C. 324, 258 F. 2d 418 (1958), initial decision on remand, 17 RR 1001, 1020-21 (1958); *Massa-*

observations by the appropriations committees induced by the Postmaster General's obvious concern over the outcome of pending litigation and could under no circumstances be considered to modify or repeal the substantive legal standards by which he is bound.

IV. NO SPECIFIC STATUTORY PROVISION FOR REVIEW OF FOURTH-CLASS RATE REFORMATIONS IS NECESSARY TO SUSTAIN THIS SUIT.

A. *This is not a suit against the United States and consent is therefore unnecessary.* Point II of appellants' brief argues that this is an unconsented suit against the United States (pp. 13-17). In support of this point, appellants place their principal reliance on *Doehla Greeting Cards, Inc. v. Summerfield*, 97 App. D. C. 29, 227 F. 2d 44 (1955), which dealt with the last parcel post rate increase.

In *Doehla*, the Court of Appeals pointed out that the question whether a suit such as this is against the United States or not was dependent upon the language of the statute in question—that is, upon the very merits of the case. The Court said (97 App. D.C. at 31, 227 F. 2d at 46):

“... As this court said in *West Coast Exploration Co. v. McKay*, 93 U.S. App. D.C. 307, 213 F. 2d 582, certiorari denied 1954, 347 U.S. 989, 74 S. Ct. 850, 98 L. Ed. 1123:

‘Where a plaintiff asserts in his complaint that an officer of the Government is acting without power and that therefore his acts are invalid, the court, in determining the preliminary jurisdictional question whether or not the United States is a necessary party, is confronted with a problem arising out of the fact that the determination of that question involves passing upon the very question involved in the merits.’ 213 F. 2d at page 592.” (Emphasis added)

Massachusetts Bay Telecasters v. FCC, ... App. D.C., 261 F. 2d 55, 65-67 (1958); *WORZ, Inc. v. FCC*, ... App. D.C., 268 F. 2d 889 (1959); *Sangamon Valley Television Corp. v. United States*, ... App. D.C., 269 F. 2d 221 (1959); *Prettyman, The Nature of Administrative Law*, 44 Va. L. Rev. 685, 693 (1958); *Prettyman, Trial by Agency*, 9 (1st ed. 1959).

The question "involved in the merits" of this case is whether appellants have power to approve and promulgate rates formulated in completed disregard of the commands of the Postal Policy Act. The *Doehla* case was decided before the Act was even passed, and cannot possibly be determinative of this question.

Thus, if the Postmaster General is required to follow the Postal Policy Act, the *Doehla* case is not in point. Since the appellant Summerfield wholly disregarded the Postal Policy Act, no one can suggest, in the language of the test applied in *Doehla*, that: "if he acted *erroneously* he was within the scope of statutory power; he *erroneously performed a statutory duty*." (97 App. D.C. at 32, 227 F. 2d at 47, emphasis added) Here, the appellant Summerfield paid no heed to the Act whatever because he viewed it as inapplicable.

The *Doehla* opinion shows clearly that the Postmaster General there followed "his construction" of the statute there in question, 39 U.S.C. § 247; he did not ignore it completely (97 App. D.C. at 32, 227 F. 2d at p. 47, text at footnote 1). While the complaint alleged in broad terms that the Postmaster General had exceeded his power under the statute, it also showed that he had attempted to follow the statute. (97 App. D.C. at 32, 227 F. 2d at p. 47, footnote 1) He was authorized by the statute there in question to propose a rate increase to the ICC after making either one of two alternative findings. The statute said:

"... If the Postmaster General shall find on experience that [the old rates] ... are such as [1] to prevent the shipment of articles desirable, or [2] to permanently render the cost of the service greater than the receipts of the revenue therefrom," he is authorized to reform the rates, with the ICC's consent, "in order [1] to promote the service to the public or [2] to insure the receipt of revenue from such service adequate to pay the cost thereof." (39 USC § 247, emphasis added)

In substance, what plaintiffs objected to in *Doehla* was that the Postmaster General had failed to make finding 1 and had failed to serve objective 1. As the brief for the Postmaster General there pointed out:

"Appellants [parcel post users] read that statute [39 USC § 247] as providing that existing rates cannot be revised unless they prevent the shipment of articles desirable [finding 1], and that, when such condition has been determined to exist, the rates may be revised, but only in order to promote the service to the public [objective 1] . . . [39 U.S.C. § 247] clearly authorizes the Postmaster General to revise rates *if one of two conditions obtains*: (1) if the rates are such as to prevent the shipment of articles desirable, *or* (2) if the rates are such as to permanently render the cost of the service greater than the receipts of revenue. If *either of those conditions* is found on the experience of the Postmaster General to exist, then the Postmaster General may reform the rates to accomplish the corresponding objective; (1) to promote the service to the public, *or* (2) to insure the receipt of revenue from the service adequate to pay its own cost."¹

Thus, the substance of plaintiffs' argument in *Doehla* was that the Postmaster General had taken the wrong one of two alternative courses of action, either one of which was within his power to take. The case therefore is no bar to a complaint which alleges that the Postmaster General wholly ignored applicable statutory requirements.

Nor does the *Larson* case prevent this Court from taking jurisdiction. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (Appts. Mn. Br. 14) The *Larson* case holds "that if the actions of an officer *do not conflict with the terms of his valid statutory authority*, then they are the actions of the sovereign" and may not be enjoined without the sovereign's consent (337 U.S. at 695, emphasis added). The Supreme Court repeatedly stated

¹ Brief for Appellees (Postmaster General and members of ICC) filed June 13, 1955, p. 39 (emphasis added).

that suits to restrain action "not within the officer's statutory powers" were not against the United States and could be maintained without its consent (337 U.S. at 698-703).

The complaint in this case clearly meets this test. It alleges, for example, that appellant Summerfield exceeded his statutory authority in the formulation of the rates by failing to give any effect whatever to the Postal Policy Act, thereby contravening explicit commands contained in that Act (pars. 19, 27, J.A. 8-9, 12). It was conceded for the purpose of the motion to dismiss that the appellant Summerfield formulated the rates in complete disregard of the Postal Policy Act. Therefore, under the *Doehla* and *Larson* cases, and under numerous more recent decisions, this is not a suit against the United States.¹

B. *Judicial review is authorized by 28 U.S.C. § 1339.* Appellees relied primarily on 28 U.S.C. § 1339 to establish jurisdiction in the District Court. It provides for district court jurisdiction "of any civil action arising under any Act of Congress relating to the postal service." (Emphasis added) Since this action arose under the Postal Policy Act of 1958, Section 1339 is clearly applicable.²

¹ E.g., *Greene v. McElroy*, 360 U.S. 474 (1959); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Harmon v. Brucker*, 355 U.S. 579 (1958); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *Atchison, Topeka & S. F. Ry. Co. v. Summerfield*, 97 App. D.C. 203, 229 F. 2d 777 (1956), cert. denied, 351 U.S. 926; *State Department Federal Credit Union v. Folsom*, 99 App. D.C. 182, 238 F. 2d 258 (1956); *McKay v. Wahlenmaier*, 96 App. D.C. 313, 226 F. 2d 35 (1955).

² See also 28 U.S.C. §§ 1331 and 1337. Reliance has not been placed upon the Urgent Deficiencies Act (28 U.S.C. § 1336) under which a three-judge district court has jurisdiction to enjoin orders of the Interstate Commerce Commission because a three-judge court in this district has held that an order of the Commission consenting to parcel post rate increases is not the kind of "order" requiring the convening of three judges (*Spiegel, Inc. v. United States*, Civ. A. 2785-51, Order of September 24, 1951). This decision does not of course mean that the Commission's action may not be reviewed. See *Doehla Greeting Cards, Inc. v. Summerfield*, 116 F. Supp. 68, 75 (D. D.C. 1953); *United States v. Griffin*, 303 U.S. 226, 238 (1938); *Compare Shields v. Utah, Idaho Central Ry. Co.*, 305 U.S. 177 (1938) with *Shannahan v. United States*, 303 U.S. 596 (1938).

Appellants say, however, that no judicial review whatever of parcel post rate reformations has been authorized by Congress because no statutory provision for review of this specific kind of case exists. They would limit 28 U.S.C. § 1339 to cases "where a statute relating to the postal service requires or permits judicial review . . .". (Appts. Mn. Br. 15)

The broad language of 28 U.S.C. § 1339 cannot and has not been so interpreted. It has long been the main basis for a multitude of suits to set aside postal fraud, obscenity and other orders issued by the Postmaster General, *suits that are not specifically authorized by any postal legislation*.¹

Moreover, the Supreme Court has said that the predecessor of Section 1339 authorized review of ICC orders applying other postal laws—those relating to railway mail pay:

"[A]s district courts have jurisdiction of every suit at law or in equity, 'arising under the postal laws.' . . . *suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally.*" United States v. Griffin, 303 U.S. 226, 238 (1938) (Emphasis added)

General jurisdictional grants such as 28 U.S.C. § 1339 (and 28 U.S.C. § 1337 on which appellees also rely) have long formed the basis for suits to review administrative action where no specific statutory form of review was pro-

¹ See, e.g., *Williams v. Fanning*, 332 U.S. 490, 492, note 2 (1947) (postal fraud). ("Jurisdiction was invoked under § 24(6) of the Judicial Code, 28 U.S.C. § 41(6) . . . [the predecessor to 28 U.S.C. § 1339]"). See also *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Oakley v. Summerfield*, 98 App. D.C. 22, 231 F. 2d 775 (D.C. Cir. 1956), cert. den. 352 U.S. 912; *Tourlanes Publishing Co. v. Summerfield*, 98 App. D.C. 20, 231 F. 2d 773 (1956), cert. den., 352 U.S. 912; *Summerfield v. Sunshine Book Co.*, 95 App. D.C. 169, 221 F. 2d 42 (D.C. Cir. 1954), cert. den. 349 U.S. 921. Cf. *Atchison, T. & S. F. Ry. Co. v. Summerfield*, 97 App. D.C. 203, 229 F. 2d 777 (D.C. Cir. 1956), cert. den., 351 U.S. 926.

vided.¹ Nor has the fact that an administrator or agency was given initial jurisdiction of the matter prevented district courts from taking jurisdiction to protect rights which the administrator or agency had ignored, as the ICC and the Postmaster General did here. (Appts. Mn. Br. 16)²

Finally, that the ICC is not specifically required by statute to hold a hearing does not mean that parcel post rate reformatations are unreviewable. (Appts. Mn. Br. 16) The ICC has consistently held hearings in cases of this kind since at least 1932,³ and it did so here. Moreover, the books are full of cases involving judicial review of administrative action taken under statutes which did not require hearings. Review has been permitted both where the administrator held a hearing, although not required to do so by statute,⁴ and where he did not.⁵ It has even been

¹ E.g., *Leedom v. Kyne*, 358 U.S. 194 (1958); *Harmon v. Brucker*, 355 U.S. 579 (1958); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) (suit against Postmaster General—cited with approval in both *Leedom* and *Harmon*, *supra*); *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937); *United States ex rel. Kansas City Southern Ry. Co. v. ICC*, 252 U.S. 178 (1920).

² See, e.g., *Leedom v. Kyne*, 358 U.S. 184 (1958) (suit against NLRB brought under 28 U.S.C. § 1337); *Stark v. Wickard*, 321 U.S. 288 (1944) (suit against Secretary of Agriculture brought under predecessor of 28 U.S.C. § 1337 and under D.C. Code provisions listed in the instant complaint, par. 3); *Shields v. Utah, Idaho Central Ry. Co.*, 305 U.S. 177 (1938) (suit to review ICC action taken on petition of Mediation Board brought under predecessor of 28 U.S.C. § 1337); *Williams v. Fanning*, 332 U.S. 490 (1947) (suit against Postmaster General, brought under predecessor to 28 U.S.C. § 1339); *Farmer v. U.E.R. & M.W.A.*, 93 App. D.C. 178, 211 F. 2d 36 (1953), cert. den. 347 U.S. 943 (suit against NLRB brought under 28 U.S.C. § 1337).

³ *Proposed Changes in Rates and Regulations Affecting Fourth-Class Mail Matter: Changes in Rates*, 182 ICC 187, 191 (1932).

⁴ E.g., *Greene v. McElroy*, 360 U.S. 474 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Peters v. Hobby*, 349 U.S. 331 (1955); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

⁵ E.g., *American Broadcasting Co. v. FCC*, 347 U.S. 284 (1954); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Functional Music, Inc. v. FCC*, Nos. 14374, 14375, ... App. D.C., — F. 2d, 27 L.W. 2234 (Nov. 7, 1958), cert. den. 80 S. Ct. 50; *Caples Co. v. United States*, 100 App. D.C. 126, 243 F. 2d 232 (1957).

permitted where the statute specified that the administrator's action was "in his absolute discretion."¹

V. APPELLEES HAVE STANDING TO SUE.

A plaintiff seeking to challenge official conduct has standing to do so, even in the absence of a statutory remedy for "aggrieved persons", if he can show an interest of a nature recognized (1) at common law or (2) by statutory or constitutional provisions. Thus, a "litigant ordinarily has standing to challenge governmental action of a sort that, *if taken by a private person*, would create a right of action cognizable in the courts. . . . Or standing may be based on an interest created by the Constitution or a statute."²

The mail order company appellees, who ship their goods by parcel post, have standing under *both* theories. First, at common law, shippers such as appellees had standing to challenge unreasonable and discriminatory rates because the "collection by a common carrier of exorbitant charges is a tort . . ."³ Therefore, if the postal establishment were a private carrier, appellees' right to reasonable rates would be judicially protected at common law.⁴ For this reason, standing of the first kind is present here.

Second standing of the kind which is created when a statute establishes a new right is also present. As set forth above, the Postal Policy Act establishes a right in mail users to reasonable and fair parcel post and catalog rates—that is, to rates established pursuant to its new

¹ *Service v. Dulles*, *supra*, 354 U.S. at 370; cf. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

² *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 152 (1951) (concurring opinion, emphasis added); see *Associated Industries v. Ickes*, 134 F. 2d 694, 700 (2d Cir., 1943), appeal dismissed as moot, 320 U.S. 707.

³ *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654, 660 (1931).

⁴ See *Arizona Grocery Co. v. Atchison, T. & S. F. Ry.*, 284 U.S. 370, 383 (1932); *Western Union Teleg. Co. v. Call Publishing Co.*, 181 U.S. 92 (1901); *ICC v. Cincinnati, N.O. & T.P. Ry. Co.*, 167 U.S. 479, 17 S. Ct. 896, 898 (1897).

standards. The Supreme Court has recognized that the establishment of a statutory right in shippers to reasonable carrier rates creates standing in those shippers to seek review of ICC determination of reasonableness, even though no explicit statutory provision permits review by "persons aggrieved".¹

In *Youngstown Sheet & Tube Co. v. United States*,² shippers of coal brought suit to set aside as unreasonable, discriminatory, and unsupported by the evidence, an ICC order increasing the minimum rail carrier rates on coal. No special statute gave them standing. Complaint was therefore filed under a general jurisdictional provision, quite like that upon which appellees rely, which stated that "... the district courts shall have original jurisdiction ... of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission."³

The Supreme Court held that the shippers had standing to attack ICC rate orders under this provision. The lower court suggested that standing might be based on a shipper's common law right to challenge unreasonable rates.⁴ The Supreme Court, without either adopting or rejecting this rationale, stated simply:

"The appellants [shippers] were entitled to bring and maintain this suit to set aside the order. They were parties to the proceeding before the Commission, had

¹ *Youngstown Sheet & Tube v. United States*, 295 U.S. 476 (1935); *United States v. ICC*, 337 U.S. 426, 432-440 (1949); *Mitchell v. United States*, 313 U.S. 80, 93 (1941) (railway passenger); *Henderson v. United States*, 339 U.S. 816 (1950) (same).

² See note 1, *supra*.

³ 28 U.S.C. § 41 (1934 ed.). This section is now 28 U.S.C. § 1336. See p. 32, note 2, *supra*. Plaintiffs here place principal reliance on 28 U.S.C. § 1339 which states: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service."

⁴ *Youngstown Sheet & Tube Co. v. United States*, 7 F. Supp. 33, 35-36 (N.D. Ohio 1934).

a pecuniary interest in the rates and were affected by the order."¹

Mail users have repeatedly been held to have standing to set aside stop orders and fraud orders issued by the Postmaster General against their mail although no specific statutory appeal has been provided for such cases.² Indeed, in *Hannegan v. Esquire*, the Supreme Court upheld standing in the publisher of "Esquire" to challenge an order of the Postmaster General denying the publisher the right to mail "Esquire" at second-class, rather than first-class, rates.³ Thus, the standing of mail users to challenge orders affecting their rates is well recognized and the justiciability of such suits in the federal courts is clear.

Relying principally on *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), appellants argue that appellees lack standing, and that, therefore, no justiciable controversy is presented. (Appts. Mn. Br. 17-19) In *Perkins v. Lukens Steel*, the Supreme Court had before it the question of whether any rights were vested in prospective bidders by the public advertising statute, R.S. 3709, which provided:

¹ 295 U.S. at 479. (A footnote citing the three-judge court provision of the Judicial Code and the supporting cases has been omitted.)

The late Judge John J. Parker's discussion of this same point is elucidating: "In the case at bar . . . the complaining shippers are directly injured by the order complained of. If carried out, it means that they must pay 20 cents additional on every ton of coal shipped to the lake ports. This means the loss of millions of dollars to the producers of the southern field and thousands to each of the individual complainants. To say that they have not a legal interest which will be injuriously affected by the illegal order of the Commission is a position which seems to us to answer itself" *Anchor Coal Co. v. United States*, 25 F. 2d 462, 479 (S.D. W.Va. 1928).

² E.g., *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Oakley v. Summerfield*, 98 App. D.C. 22, 231 F. 2d 775 (D.C. Cir. 1956), cert. den., 352 U.S. 912; *Tourlanes Publishing Co. v. Summerfield*, 98 App. D.C. 20, 231 F. 2d 773 (1956), cert. den., 352 U.S. 912; *Summerfield v. Sunshine Book Co.*, 95 App. D.C. 169, 221 F. 2d 42 (D.C. Cir. 1954), cert. den., 349 U.S. 921, Cf. *Atchison, T. & S.F. Ry. Co. v. Summerfield*, 97 App. D.C. 203, 229 F. 2d 777 (D.C. Cir. 1956), cert. den., 351 U.S. 926.

³ *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946).

"Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery of performance is required by the public exigency, the articles of service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

It was with respect to the foregoing language that the Court said (310 U.S. 113, at 126):

"Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. *It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.* 'The United States needs the protection of publicity, form, regularity or returns and affidavit . . ., in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the government, not upon him.' *That duty is owing to the Government and to no one else.*" (footnotes omitted.)

Perkins v. Lukens Steel is not in point here at all. The public advertising statute shows on its face that it was designed to protect the government from dishonesty on the part of its contracting officers. The Court therefore held that no rights were created in prospective bidders, since the statute was not enacted *for their protection*. Quite the opposite is true of the Postal Policy Act. As set forth above, one of its important purposes was to free mail users from certain overcharges which Congress thought to be "unfair". [§ 102(5), 39 U.S.C. § 270(5).] The Act also prohibits charging "any class of users of

the mails" with public service costs. [§ 103(c)(3)(A), 39 U.S.C. § 270b(3)(A).] These sections were designed for the protection of mail users, not the government. Congress would obviously not have decreed that public service costs be paid by the government rather than mail users if it had been concerned only with protecting the monetary interests of the government.

The other cases cited by the defendants are no more in point. *Massachusetts v. Mellon* (Appts. Mn. Br. 19) established only that neither a state nor an individual taxpayer has standing to restrain the making of federal expenditures. *Alabama Power Co. v. Ickes*, *Tennessee Electric Power Co. v. TVA*, and *Kansas City Power and Light Co. v. McKay* (Appts. Mn. Br. 19-20) were all concerned with federal actions which created or assisted competitors to the plaintiff power companies. The Supreme Court pointed out in *Alabama Power Co. v. Ickes* that the plaintiffs could not have challenged financial assistance to a competitor if that assistance had been provided by a private person. (302 U.S. at 480-484)¹ And, in *Tennessee Electric Power Co. v. TVA*, the court held that since plaintiffs could not be heard to complain of competition by privately owned public utilities, they lacked standing to attack competition by the government. (306 U.S. at 137-143)

As pointed out above, appellees could have challenged unreasonable or discriminatory parcel post rates at common law if the Post Office Department had been a privately owned public utility. (See p. 35, *supra*) Therefore, under accepted theories of standing, appellants^{EEs} may question the rates established by the appellant Summerfield in this

¹ In the companion case to *Alabama Power Co. v. Ickes*, the Supreme Court approved an opinion which said: "No one will contend that if such loan and grant [to publicly owned power plants] were made by the Administrator from his own funds or the funds of a private person, plaintiff would have any standing to enjoin it; and we cannot see that the source of the funds can affect the question of invasion of rights, where plaintiff has no such interest in the funds as it could protect by injunction." *Duke Power Co. v. Greenwood County*, 91 F. 2d 665, 677 (4th Cir., 1937), *aff'd* 302 U.S. 485 (1938).

proceeding (*Ibid.*). Since this is so, the rationale of *Alabama Power Co. v. Ickes*, *Tennessee Electric Power Co. v. TVA*, and *Kansas City Power and Light Co. v. McKay* is clearly inapplicable.

To hold that appellees have standing is not to hold that all fourth-class mailers or all members of the public have standing, as appellants contend (Appts. Mn. Br. 18-19). The complaint alleges that the three mail order company appellees deliver their products to their customers by parcel post, and that parcel post postage form a large proportion of the cost of doing business for each of them (par. 8, J.A. 3-4). It also alleges that some members of the appellee Parcel Post Association are "threatened with destruction of their businesses and effective exclusion from the parcel post service by the rates." (par. 33, J.A. 14)

While the rate schedule is obviously not directed at appellees alone, its impact upon them, as alleged above, is severe. They therefore have standing even though the rate schedule may affect many other mail users.¹

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

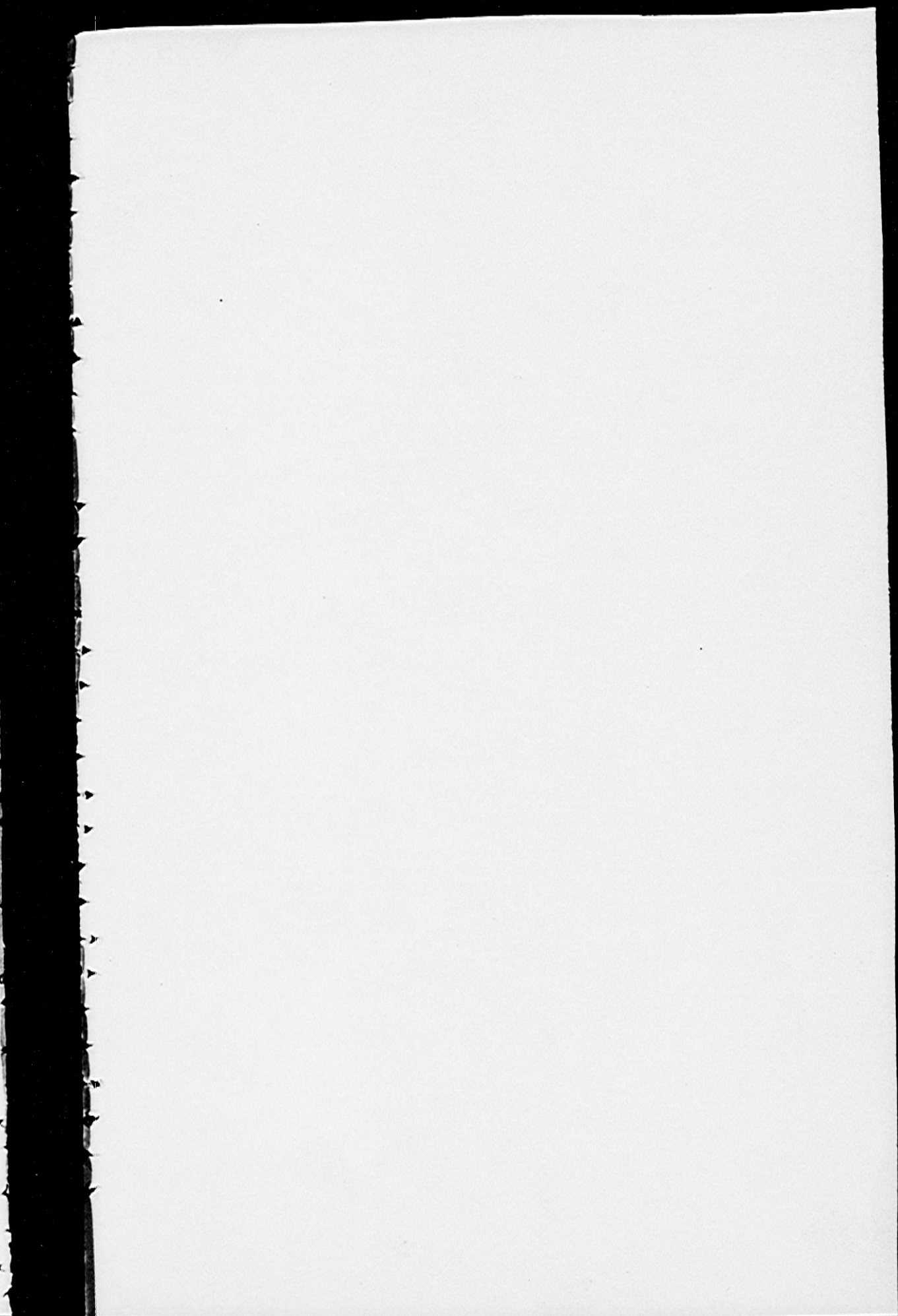
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¹ *E.g.*, *Youngstown Sheet & Tube v. United States*, *supra*, note 1, p. 36. *Cf.* *Columbia Broadcasting System v. United States*, 316 U.S. 407, 422 (1942).



APPELLANTS' REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15591

ARTHUR E. SUMMERFIELD, ET AL., APPELLANTS

v.

PARCEL POST ASSOCIATION, INC., ET AL., APPELLEES

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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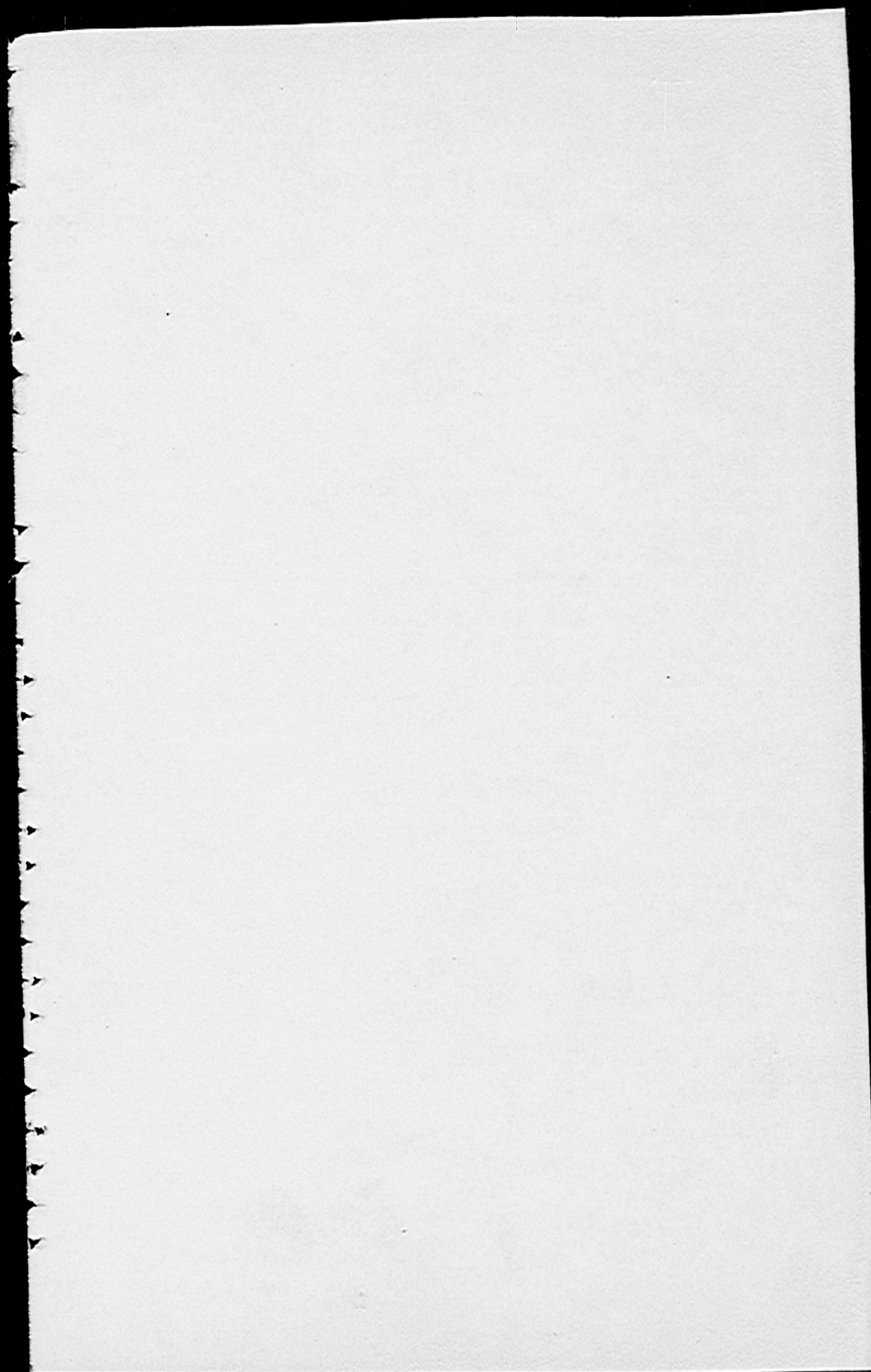
*United States Court of Appeals
For the
District of Columbia Circuit*

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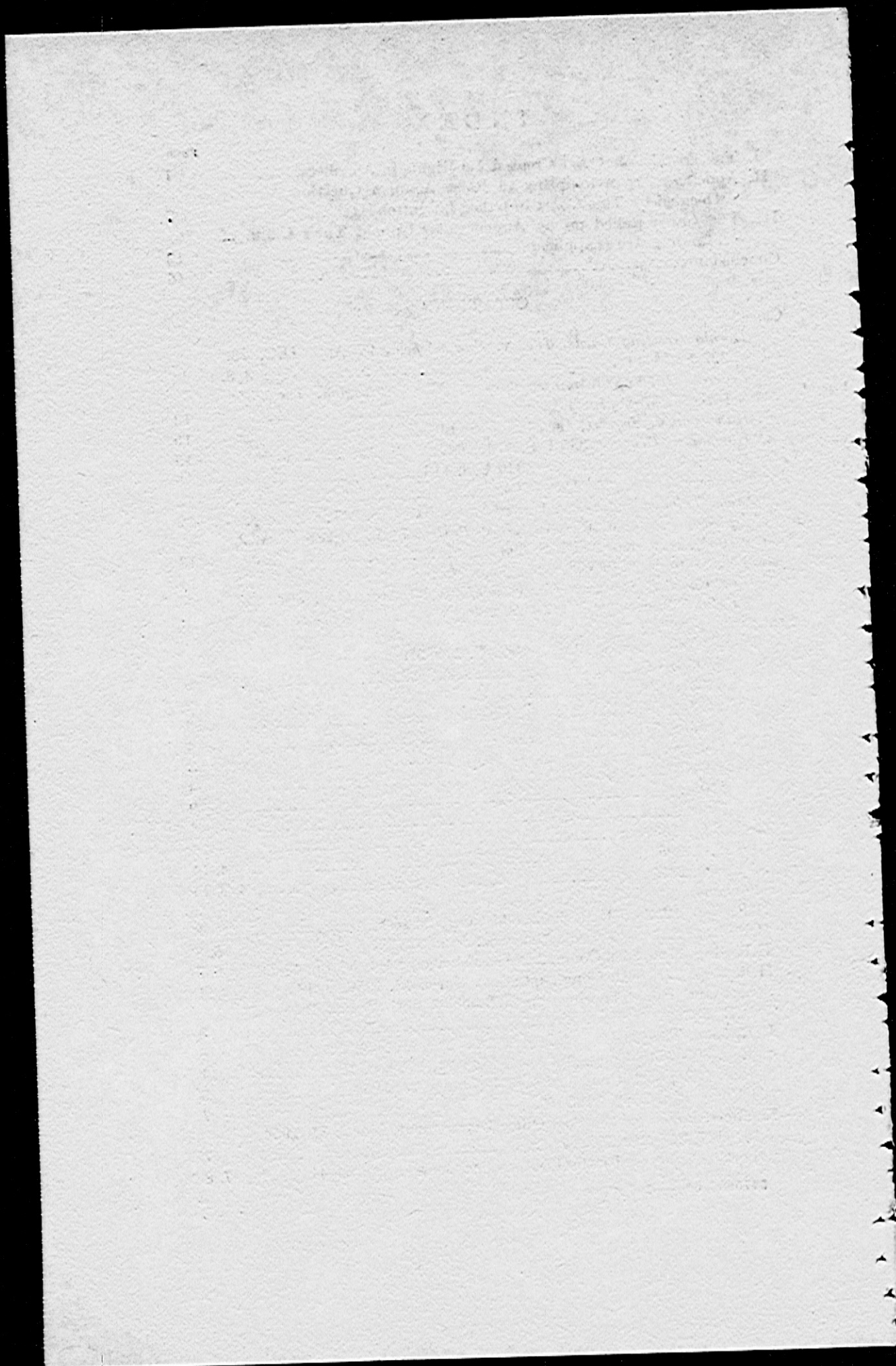
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APPELLANTS' REPLY BRIEF

I. The Postal Policy Act created no rights in appellees

In Points I and II of their brief, appellees state that the Postal Policy Act is applicable, that it therefore created a right in appellees to have their rates fixed pursuant to its standards, and that this right was violated.

In their attempt to show that the Act governed the Postmaster General in his making of the reformation of parcel post rates here in issue (that is, that the Act was "applicable") they argue that he contravened the standards set forth in the Act by charging against fourth-class mail (1) certain amounts properly allocable to the special facilities devoted to first-class mail and (2) a share of the losses on "public service" operations of the postal establishment.

With respect to the first claim, they rely on Section 103 (c)(2) of the Act, 39 U.S.C. 270a(c)(2). They state that this section requires the "allocation to first-class (not to the other classes) of the following costs: * * * (b) an additional amount representing the fair value of all extraordinary and

preferential services, facilities and factors related thereto." (Emphasis in appellees' brief, p. 6.)

This is a highly deceptive presentation of the statute, as an examination of the omitted portion of the sub-section, and its context, reveals. Section 103(c)(2) reads in full as follows:

The acceptance, transportation, and delivery of first-class mail constitutes a preferred service of the postal establishment and, therefore, the postage for first-class mail should be sufficient to cover (A) the entire amount of the expenses allocated to first-class mail in accordance with this title and (B) an additional amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto.

Congress here is obviously talking about first-class mail rates and how they should be fixed. They should be fixed to cover the costs of first-class mail, plus an additional amount representing the *fair value*, not the *cost*, of the preferential services and facilities. Such a determination is and must necessarily be a legislative one. Not even the appellees claim that the Postmaster General should determine the "fair value" of anything. Yet on page 6, line 14, of their brief they refer to this fair value as a "cost." On page 7, lines 2-5 of the second full paragraph, they state that to first-class mail must be allocated not only its normal expenses but an additional amount of *expenses* representing the value of its preferred services.

Obviously that is not what the statute says or means. It says and means merely that in fixing rates for first-class mail Congress will fix them so as to cover costs, plus an additional amount representing the fair value of the preferences that first-class mail enjoys. The Postmaster General does not fix first-class rates, Congress does. In stating its policy for doing so it shows no disposition to require any reallocation of expenses, nor is there any direction to the Postmaster General to subtract from fourth-class costs any amount representing the fair value of the first-class preferential facilities.

Appellees argue further that they are being compelled to bear some portion of the expenses incurred by reason of these preferential facilities and that they have a newly conferred

right, as fourth-class mail users, to be free of such charges. This claim is not stressed in their brief, emphasis being put on the "additional amount" which, as has been shown, does not refer to costs at all. To the extent that they argue that they are being saddled illegally with any part of the actual costs of first-class mail, their claim amounts merely to the statement that the Postmaster General erred in allocating costs as between the various classes of mail, that is, that he took erroneous action in pursuance of a validly delegated power.¹ Such action, as this Court held in *Doehla Greeting Cards, Inc. v. Summerfield*, 97 App. D.C. 29, 227 F. 2d 44, 47, is inescapably the action of the United States and the effort to enjoin it must fail as an effort to enjoin the United States. In the case at bar the United States is not named as a party and appellees vigorously deny that any action of the United States is challenged in this suit.

It is perhaps for this reason that they lay stress on the Postmaster General's failure to deduct from fourth-class mail costs any amount representing the "fair value" of the preferential facilities accorded to first-class mail, rather than upon the claim of mere error in cost allocation. The latter claim would be no more than an attempt to obtain judicial review of cost accounting processes already once reviewed by the Commission.

The claim with respect to the "public service" provisions is no better founded. It is true, as appellees state, that the Act gives a list of Post Office activities which "shall be considered to be public services for the purposes of this title," § 104(a), 39 U.S.C. 270b(a), and that among them is "the loss resulting from the operation of such prime and necessary public services as the star route and third- and fourth-class post offices." But this identification of these activities

¹ It is worth noting that such a claim of error is contrary to the explicit finding of the Interstate Commerce Commission which held (Jt. App. pp. 100-101) that costs allocated to fourth-class mail are substantially accurate for the purpose of this proceeding in that they "do not include any substantial proportion of the costs which should be allocated, within the meaning of the Postal Policy Act of 1958—(1) To the preferred services accorded first-class mail. (2) To the public services designated in said Act."

as public services must be looked upon in its context, which is significantly omitted from appellees' brief.

The section preceding § 104(a) that is, Section 103, sets forth, in its first part, the declaration that Congress emphasizes its function of forming postal policy, that standards should be set up whereby the postal rate structure may be fixed and adjusted *by Congress*, and states what those standards are. The one relating to public services provides that the sum of those public service items *as determined by Congress* should be paid out of the Treasury and should not be recovered from mail users by rates and fees, § 103(c)(3)(A). But, as shown in our main brief, pp. 10-11, Congress has since determined that nothing should be paid out of the Treasury for star routes and third- and fourth-class post offices, though it did make other appropriations for other activities and services as "public services." It made this determination in accordance with the appropriation procedure provided in Section 104(b) of the Act.

Faced with this Congressional determination, and with the mandate of 39 U.S.C. 247 and 31 U.S.C. 695 that fourth-class revenues cover fourth-class costs, within four per cent, the Postmaster General took the only course open to him and raised fourth-class rates to cover costs, without regard to the public service items not appropriated for by Congress. No other action was permissible.

Appellees urge that Section 106 of the Act, 39 U.S.C. 270d, shows that some other result was intended, since this section provides that the Act "shall not require any downward adjustment in rates of postage on fourth-class mail * * *." They read this (appellees' brief, page 6) as an expression of Congressional intent that there should be no increase.

Congress is not usually so diffident in its expressions. The section has a meaning more closely related to its words than that which appellees attribute to it.

Had Congress appropriated a sum for star routes and third- and fourth-class post offices, the Postmaster General would thereby have been reimbursed for some part of the costs of fourth-class mail, since those activities are devoted, in part, to the handling of such mail. In that way, such an appropria-

tion could have caused a reduction in fourth-class rates, since if part of the costs had been covered by appropriation, there would be no need for that part to be covered by rates. But Congress wanted no reduction in rates even had such a situation arisen, and this section says so. It was designed to cover a situation that never arose, and it is the only mention of fourth-class mail that the Act contains. Thus the single mention of fourth-class mail exists for the sole purpose of making certain that the Act could *not* apply to it, even in the hypothetical contingency envisioned.

Appellees' discussion of legislative history is no more successful in bolstering their position than is their examination of the Act itself. The first section of their brief (Point I, pp. 5-16), which is designed to show that the Act "created a right in appellees to have their rates fixed pursuant to its standards" (p. 5), nowhere shows that Congress knew it was bestowing any rights on anyone when it enacted the language on which they rely. One would suppose that the bestowal of such rights upon so large a class of persons as the users of the parcel post, and the accompanying waiver of sovereign immunity, would have been mentioned at a committee hearing, or alluded to in a committee report, or spoken of in a House or Senate debate, if not stated forthrightly in the Act. The absence of any such expression seems to make it clear that Congress did not know that it was doing what appellees say it was doing.

The legislative history in fact shows that the Act was intended to be what its title indicates, namely, a statement of policy. The report of the House Committee on Post Office and Civil Service on the House version of the bill² states (at p. 26):

POSTAL RATE POLICY

Title II of H.R. 5836 relates to the establishment of a policy for postal rates by Congress. It provides for recommendations to be made by the Postmaster General with respect to the postal rate structure in conformity with certain principles. This policy declaration was adopted by the committee to provide a formalized statement of the basic principles recognized by Congress in the adjustment of the postal rate structure.

² H.R. Rep. 524, 85th Cong., 1st sess., June 3, 1957.

RATES IN BILL RELATED TO POLICY

In effect, title II of this bill provides a formalized policy statement of logical ratemaking principles while title I gives implementation to this policy through realistic postal rate adjustments at this time.

Title II of H.R. 5836 referred to in the above quotation is the House version of the bill which later became the Postal Policy Act of 1958. Title I of H.R. 5836 became Title II of Public Law 85-426 and relates to postal rate increases, while the Postal Policy Act became Title I of that Public Law.

Similarly, the report of the Senate Committee on Post Office and Civil Service³ at page two indicates that the Act was viewed only as a policy declaration.

The Conference Report⁴ follows the same line. It states (at p. 45):

POSTAL RATE POLICY

Title II of the House bill and Title I of the Senate amendment each set forth a postal rate policy to serve as a guide in the determination and adjustment of postal rates *by the Congress* (Emphasis supplied).

Furthermore, it does not follow, even if the Act is "applicable" to the Postmaster General's action here in issue, that it therefore created any right in appellees. Congress, merely by directing the actions of an administrative official, does not thereby create any right in those affected by his actions. *Perkins v. Lukens Steel*, 310 U.S. 113. Thus, not only is the premise on which appellees base their first two points erroneous, but the conclusions they draw do not follow from it in any event.

The references in appellees' brief (p. 11 et seq.) to the "Carlson report" reach an erroneous conclusion. That report set forth a proposed policy which would require costs of service, other than first-class, to be fixed on the basis of direct or incremental (i.e., out-of-pocket) expenditures. That is, classes of

³ S. Rep. 1321, 85th Cong., 2d sess., February 24, 1958.

⁴ H.R. Rep. 1760, 85th Cong., 2d sess., May 21, 1958.

mail other than first-class would be charged, not with their share of the costs of all postal facilities based on use, but only with such extra costs as would not have existed but for the carrying of these classes of mail. The Postmaster General, supported by the Comptroller General and other authorities, opposed such a policy. It was their view that the Post Office was not established primarily for first-class mail, as the Carlson report assumed, but to handle all classes of mail simultaneously as an integrated operation.⁵

The advocates of the "primary function" theory persisted to the extent that H.R. 5836, as reported by the Senate,⁶ contained an allusion to it in Section 103(c)(2), but even there fourth-class mail was explicitly excepted from the requirement that costs of mail, other than first-class, and costs of special services, be computed on an incremental or "out-of-pocket" cost basis. Before the bill was enacted into law even the remaining vestiges of the "out-of-pocket" cost theory were eliminated from it by the Senate-House conference.⁷ The Postal Policy Act contains no reference to it. Thus appellees' attempt to create a non-existent ambiguity in the Act and then explain it by resort to legislative history must fail because of the invalidity of their theory as well as of their method. Neither the Act itself nor its legislative history points to the creation of any right in appellees to have the costs of fourth-class mail computed in the way they demand.

II. Appellees are attempting to raise again a question already decided by this court in other litigation

Appellees claim that appellants' argument to the effect that fourth-class mail must recover its cost is to beg the question

⁵ Financial Policy for the Post Office Department, March 31, 1954, pp. 181-187, 217-249; Audit Report to the Congress of the United States: Report on the Review of the Cost Ascertainment System, Post Office Department, 1957, by the Comptroller General, pp. 39-41.

⁶ 104 Cong. Rec. 2569. The sentence relating to out-of-pocket costs was deleted on the floor of the Senate. 104 Cong. Rec. 3105-10.

⁷ H.R. Rep. 1760, 85th Cong., 2d sess., shows at pages 49-50 the elimination of the "primary function" language in the Senate version of 103(c)(2) in favor of the present version, which describes first-class merely as a "preferred service," which it is, both in speed and in security and secrecy.

at issue. They state (Appellees' brief, p. 21) that the "essential question" is: What costs should be allocated to fourth-class?

This is not the essential question. Appellees' attempt to make it so is an attempt to avoid this Court's decision in *Doehla Greeting Cards v. Summerfield*, *supra*, in which plaintiffs tried to raise the same question. It was argued there that the Postmaster General had violated the provisions of 39 U.S.C. 247 in that he had made no finding that costs of fourth-class mail were greater than receipts. This Court held that his action was in accordance with his construction of the statutory direction and was not arbitrary or capricious, but was within the scope of his statutory authority. His authority was to reform parcel post rates in certain circumstances. The fact that he failed to find that those circumstances existed did not prevent his reformation of rates from being the action of the sovereign. Therefore, the question "What costs should be allocated to fourth-class?" was not before the court because there had been no waiver of sovereign immunity permitting it to be raised.

Similarly, in the case at bar, the question of what costs should be allocated to fourth-class mail is a matter which the statute does not commit to judicial review. Obviously, if it did so the courts would be bogged down in a mass of cost ascertainment figures every time a reformation of fourth-class rates took place and possibly also every time Congress changed the rates on other classes of mail.

The cost ascertainment system used by the Postmaster General is a system selected by him in his discretion as the result of many years of experience with it, and Congress was fully familiar with it.* The question "What costs should be allocated to fourth-class?" is not the question before this Court at all. The question before the Court is whether the Act affects the Postmaster General in his fixing of fourth-class rates and if so whether what he did was still the act of the sovereign and whether appellees have standing to challenge it. The examina-

* H.R. Rep. 524, 85th Cong., 1st sess.; H.R. Rep. 1252 on H.R. 6052, 83d Cong., 2d sess.; Report of the Comptroller General to Congress, *supra*, n. 5; Senate and House hearings on H.R. 5836, 85th Cong., 1st sess., etc.

tion of the Act made in the Government's main brief shows that the Act does not apply to this rate reformation at all and shows furthermore that it does not grant any consent to sue the United States or bestow upon users of the postal system any right which would give rise to a justiciable controversy.

The argument that Congress did not place upon itself the responsibility for the administration of the Act is likewise not supported by the examination of the Act itself. It is true, as appellees claim, that the Congress which enacted the Postal Policy Act knew that no statute which it enacted could bind later Congresses. Nevertheless, it is certainly within the competence of any Congress to make a statement of policy in the form of legislation. The suggestion in appellees' brief (p. 22) that the subject matter of this Act might better have been in the form of a resolution is not well taken, because a portion of the Act is mandatory. Section 105(b) requires the Postmaster General to submit reports to Congress. It is in the light of these reports that Congress will administer the Act, as Section 103(b)(3) provides.

Appellees profess to find support for their position in an action which the Senate took to modify the bill passed by the House. The bill contained a statement that the Postal Policy Act "will serve as a guide in the determination and adjustment by the Congress from time to time of the postal rate structure." Appellees argue that the fact that the Senate struck this provision from the bill suggests that it did not intend that Congress would be the sole agency to which the Act would apply. However, virtually the same language appears in Section 103(b)(3) of the Act which declares the policy of the Congress to be "to provide a means by which the postal-rate structure may be fixed and adjusted by the action of the Congress from time to time, as the public interest may require * * *." In the light of this provision there was no need for the one stricken.

Appellees admit that Congress placed responsibility on itself to determine the amount of the "public services" each year. They point out that no public service appropriation was enacted for fiscal 1957 and reason from this that the Postmaster General must have been required to make some allowance for

these public services. This is equivalent to saying that the Postmaster General should reduce fourth-class costs by an amount equal to the "public services" performed by the postal establishment. The argument overlooks the fact that public service items are defined in the Act as those services "which, in whole or in part, are held and considered by the Congress from time to time to be public services * * *" and that only "the sum of such public service items as determined by the Congress" are to be paid out of the Treasury and "should not constitute direct charges in the form of rates and fees upon any user or class of users of such public services or of the mails generally; * * *," Section 103(c)(3) 39 U.S.C. 270a(c)(3). In the face of these provisions it is fatuous to argue, as appellees do, that the Postmaster General, and not Congress, should have determined the amount of the public service items.

The fact is that appellees' prime complaints do not relate to costs at all, though it is difficult to ascertain this from their brief. The complaint about the failure of the Postmaster General to increase the costs allocated to first-class mail by the "amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto" betrays a misunderstanding of the meaning of the word "costs." The amount here spoken of as a cost is not so spoken of in the statute, which refers to it as an "additional amount" over and above the cost. Had Congress in its last postal rate increase fixed letter rates at 5 cents or 10 cents instead of 4 cents it would have made no difference in the cost allocable to either first- or fourth-class.

Their argument that the loss incurred in the operation of the star route and third- and fourth-class post offices has erroneously been charged against fourth-class mail rates falls to the ground because of a similar misunderstanding. The loss on these activities cannot be determined by the Postmaster General, because as the report of the Commission shows (J.A. p. 92) they are integral parts of the line-haul and collection and delivery service of the Department. Revenues, and hence losses, cannot appropriately be ascribed to such operations any more than to any other integral part of the postal service.

For instance, the cost of operating a mail truck can presumably be ascertained by accounting methods but not the loss resulting from its operation.

It was realization of this very fact that caused Congress to make no appropriation for these public services. The report of the Senate Committee on Appropriations⁹ rejected the idea of such an appropriation last year in the following language:

LOSS ON STAR ROUTES AND SMALL POST OFFICES

The Department has stated that no loss could be computed for these items. The committee goes further and believes that losses cannot be attributed to these integral parts of the postal system and designated as public services any more than losses can be attributed to truck transportation or the accounting and other staff services which are essential to successful operation of the whole postal system. Therefore the committee recommends that this item be disallowed.

The House report on the same bill¹⁰ also recognized that the Postal Policy Act is defective in its definition of public service items. As noted in the Government's main brief, no appropriation was made to cover the loss on star routes and small post offices. Therefore the claim that the Postmaster General should have reduced the costs of fourth-class mail by the amount of the loss incurred in operating the star route system and third- and fourth-class post offices is without basis in the Act and cannot be sustained. The loss is not determinable by cost ascertainment methods. It is only the Congress which can make a determination in this regard and it is only a Congressional determination that is contemplated by the Act.

Appellees claim that the Government's reliance on statements of the House and Senate Appropriations Committees is misplaced and question the propriety of the Postmaster General's action in making representations to these Commit-

⁹ S. Rep. 305, 86th Cong., 1st sess., May 21, 1959, at p. 10.

¹⁰ H.R. Rep. 227, 86th Cong., 1st sess., March 18, 1959, p. 14, lines 3-6.

tees. The implication is that the Postmaster General has brought improper influence to bear (Appellees' brief, pp. 25-29).

The Committees making the reports cited in the Government's main brief are those charged by the Congress with the implementation of the provisions of the Act there referred to. It is settled law that a legal interpretation of an Act by an executive official charged with its administration is highly persuasive in judicial constructions of the Act. The Legislative Branch is of equal dignity with the Executive and there is no reason why a statement by a committee of the Congress should not be accorded similar weight. If the body responsible for initiating the appropriations contemplated by Section 104(b) of the Act did not agree with the Postmaster General's interpretation of the statute one might well expect a statement of that disagreement to appear in the committee's report. Certainly, such a statement would not have been ignored by the appellees. For the Government to bring it to the Court's attention is no ground for criticism.

The Supreme Court has in the past given great weight to similar post-legislative pronouncements of Congress. In *Sioux Tribe of Indians v. United States*, 316 U.S. 317, plaintiffs were contending that the Indian Allotment Act of 1887 had operated to confer title to certain lands upon the Indians occupying them. In a report on a bill presented to Congress in 1892 the Senate Committee on Indian Affairs expressed the opinion that it would be preposterous to place such a construction upon the language of that Act as would divest the United States of its title to the lands in question. The Supreme Court said (at pp. 329-30):

"This statement by the Committee which reported the general Allotment Act of 1887, made within five years of its passage, is virtually conclusive as to the significance of that Act."

In the case at bar post-legislative statements by the Congressional Committee charged with the responsibility of initiating and reporting on the implementation of the Postal

Policy Act are certainly a persuasive and material matter for consideration by this Court.¹¹

By attempting to pose the question "What costs should be allocated to fourth-class?" appellees are begging the real questions before the Court—whether the Act affects the Postmaster General in his fixing of fourth-class rates and, if so, whether the action of fixing them was in fact that of the sovereign and whether appellees may challenge it.

III. The cases relied on by appellees to uphold their claim of standing are inapplicable

In the fourth section of their brief appellees rely on *West Coast Exploration Co. v. McKay*, 93 App. D.C. 307, 213 F. 2d 582, cert. den. 347 U.S. 989, for the proposition that the Court, in determining whether or not the United States is a necessary party, is required to pass upon the very question involved in the merits. They here state that the question involved in the merits of the case at bar is "whether appellants have power to approve and promulgate rates formulated in complete disregard of the commands of the Postal Policy Act." They draw the conclusion that since *Doehla Greeting Cards, Inc. v. Summerfield*, *supra*, was decided before the Act was passed it cannot possibly be determinative of that point. This argument involves a misreading of the doctrine of *West Coast Exploration Co. v. McKay*. The teaching of that case is that the courts solve the problem of whether the United States is a necessary party by accepting at face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officer, and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties, 213 F. 2d 582, at page 593. Thus, in the case of *Transcontinental and Western Air v. Farley*, 71 F. 2d 288 (C.A. 2, 1934), cert. den. 293 U.S. 603, the assertion was that the Postmaster General was without power to cancel air mail contracts which had been entered into between the United States and the complainant. Accepting that assertion at face value for purposes of jurisdiction the consequence was that if the Postmaster

¹¹ Cf. *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 87-88, Fn. 3.

General was without power to cancel the contracts the Government was bound to perform them. The United States was therefore held to be a necessary party. See also *Wells v. Roper*, 246 U.S. 335.

Applying that doctrine to the present complaint the Court would accept in the first instance the allegations that the Postmaster General reformed parcel post rates without regard to the provisions of the Postal Policy Act, since he interpreted the Act as having no bearing on this reformation. If he was right in this interpretation then obviously he was bound only by the statutes under which he acted in this case and in *Doehla*. In that event, *Doehla*, though decided before the passage of the Act, would still be applicable.

If on the other hand he was wrong in his interpretation of the Act, then the United States is relegated to a scale of parcel post rates different from that now in effect, and is bound to perform the services supplied to parcel post users at this other scale. The suit therefore is in effect an action against the sovereign. The relief demanded is to restrain the sovereign from performing certain services at certain rates, and if granted would require performance at other rates.

The Postmaster General here followed his construction of the statutes under which he acted. He obeyed 39 U.S.C. 247 and 31 U.S.C. 695 and he conceived that the Postal Policy Act did not modify the statutory instructions there given him. Appellees complain that the effect of the Act is to make him act in a particular way when complying with the other two statutes. This appellants deny, but even if it were granted for purposes of argument, he would still, in his reformation, be obeying the dictates of 39 U.S.C. 247 and 31 U.S.C. 695. He would not (accepting appellees' argument) be obeying them in the manner required, but to say this is merely to say that he committed error in his exercise of a sovereign function. In order to challenge such error appellees must show that they have been permitted to sue the sovereign.

The statute on which they rely, 28 U.S.C. 1339, was relied on by the *Doehla* plaintiffs and was held by this Court to be insufficient to give standing. The fact that it has been held to support suits to set aside orders of the Postmaster General

relating to postal fraud and obscenity does not imply that it will also support the type of suit here in issue. The cases relied on by appellees in the remainder of their brief, such as *Harmon v. Brucker*, 355 U.S. 579, *Service v. Dulles*, 354 U.S. at 370, and others stand for the proposition that regulations validly prescribed by an administrator are binding upon him as well as upon the citizen, and that a citizen being discriminated against in the administration of the regulation may seek judicial review of the administrative action. Appellees here are not being treated any differently from other users of the parcel post and are apparently seeking only to vindicate what they conceive of as a right common to all users of the parcel post. This is quite different from such a case as *Hannegan v. Esquire, Inc.*, 327 U.S. 146, relied upon by appellees, where the publisher of a magazine was being denied the right to mail his publication at second-class rather than first-class rates. Appellees here are not being excluded from using the parcel post at the same rates as anyone else.

If the Court decides that all parcel post users have standing by reason of the allegations of overcharge, it would seem to follow that an undercharge would give standing either to the users of all other classes whose rates were consequently increased, or to no one at all. The first alternative is inconceivable. The second would mean that Congress has bestowed litigable rights to contest an error charging excessive costs against parcel post, but not to contest the charging of excessive costs against other classes of mail.

The attempt to distinguish the present case from *Perkins v. Lukens Steel*, 310 U.S. 113, must fail. Appellees argue that the statute there involved was designed to protect the Government and not the persons desirous of doing business with the Government. Examination of the Postal Policy Act shows that it was designed to enunciate a policy to be carried out by Congress. It was not designed to make parcel post rates or any other parcel rates a target for the complaints of users of the mail.

CONCLUSION

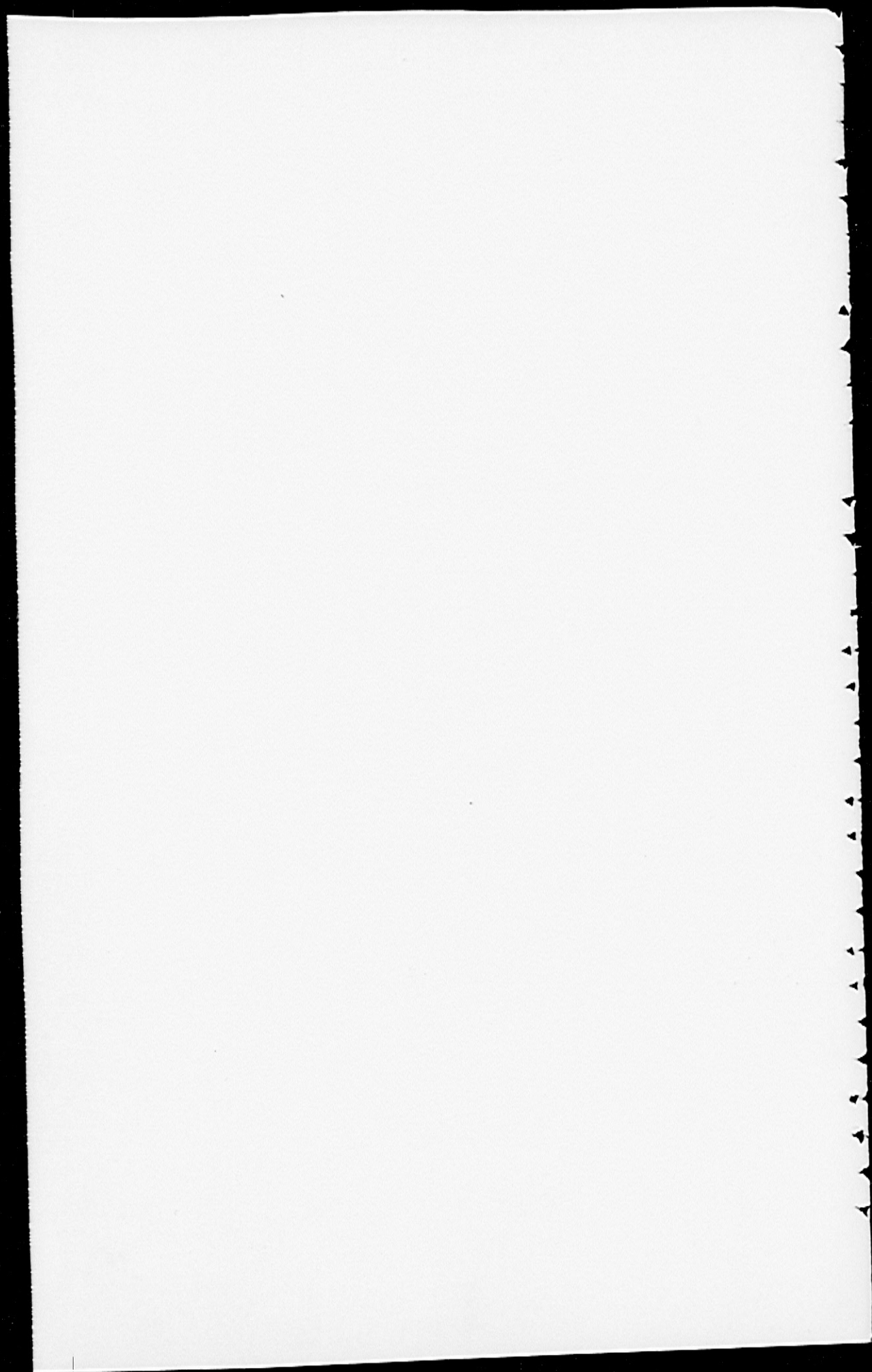
The order appealed from should be reversed, and the case remanded with instructions to dismiss the complaint.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

OLIVER GASCH,
United States Attorney.

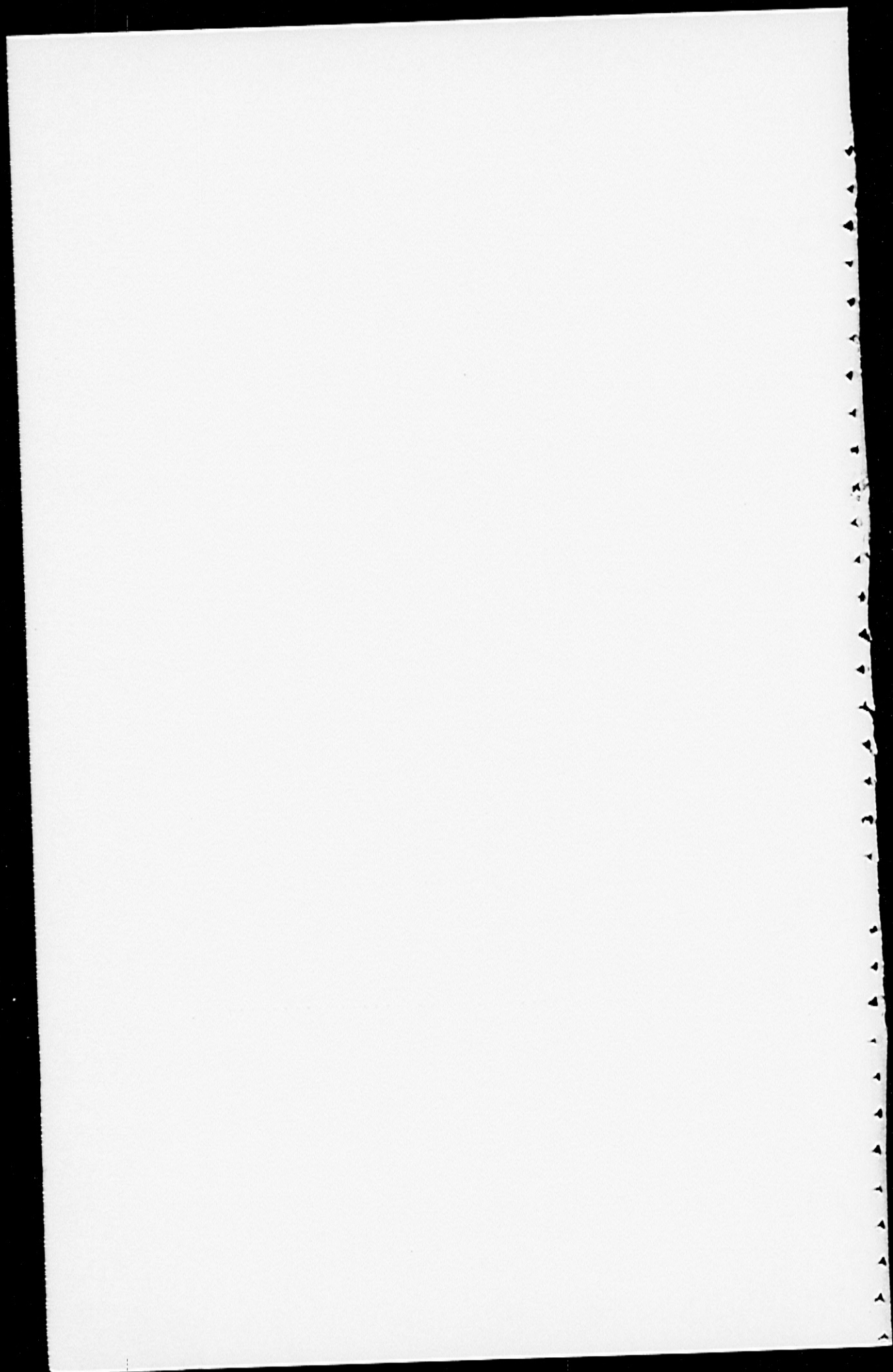
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Attorneys, Department of Justice.



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JOINT APPENDIX

Relevant Docket Entries in District Court

DOCKET No. 3366-59

1959

- Dec. 1—Complaint, appearance filed
Dec. 1—Motion of plttfs. for pre-injunction; P & A; Affidavits (4); Exhibits (5) c/s 12-1-59; M.C. 12-1-59 filed
Dec. 14—Motion of defts. to dismiss; P & A; Appendix c/m 12-14-59, M.C. 12-14-59 filed
Dec. 30—Memorandum of plttf. in opposition to motion to dismiss and in support of motion for preliminary injunction & Exhibit filed

1960

- Jan. 8—Memorandum of opinion denying motion to dismiss and motion for preliminary injunction. (N)
McGarraghy, J.
Jan. 11—Order denying plaintiff's motion for a preliminary injunction and defendants' motion to dismiss and further ordering that memorandum of January 8, 1960 shall constitute Court's findings of fact and conclusion of law (N)
McGarraghy, J.
Jan. 12—Notice of appeal by plaintiffs from order Jan. 12, 1960. Copy to Fribourg. Deposit by Bunn \$5.00
Jan. 12—Amended order denying motion of plttf. for preliminary injunction and motion of deft. to dismiss and that the Memorandum of Jan. 8, 1960 shall constitute the Court's findings of fact and conclusions of law (N)
McGarraghy, J.
Feb. 8—Certified copy of order from U.S. Court of Appeals allowing interlocutory appeal filed
Feb. 12—Answer of defts. to complaint; c/m 2-12-60 filed
Feb. 12—Notice of appeal by deft. from order of January

11th and amended order of Jan. 12th, 1960. Copy to
Roy C. Frank & Arnold Fortas & Porter (no fee govt.)
Feb. 23—Order directing that defendants notice of appeal
be transmitted forthwith to the Court of Appeals (N)
McGarraghy, J.

Filed December 1, 1959

(Caption omitted)

Complaint for Injunction and Declaratory Judgment
Plaintiffs, by their attorneys, allege as follows:

I.

NATURE OF SUIT, PARTIES AND JURISDICTION

1. This complaint is filed to restrain the Postmaster General from placing into effect increases in the postage rates for two categories of fourth-class mail, i.e., parcel post and catalogs. The complaint also requests that the Court set aside and declare unlawful an action of the Interstate Commerce Commission granting the Postmaster General's application for consent to these rates.

2. This action arises under the Postal Policy Act of 1958, P.L. 85-426, 72 Stat. 134-138 (1958), 39 U.S.C. §§ 270-270e; an Act of August 24, 1912, 37 Stat. 558, as amended, 39 U.S.C. § 247; an Act of September 27, 1950, 64 Stat. 1050, as amended, 31 U.S.C. § 695; Article I, Section 8, Clause 7, and the Fifth Amendment to the Constitution of the United States.

3. The jurisdiction of this Court is invoked pursuant to Sections 1339, 1331 and 1337 of the Judicial Code, 28 U.S.C. §§ 1339, 1331 and 1337; Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009; Sections 305 and 306 of Title 11 of the District of Columbia Code; and the Declaratory Judgments Act, 28 U.S.C. §§ 2201 and 2202. There exists between plaintiffs and defendants an actual

controversy. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs.

4. Plaintiff Parcel Post Association, Inc., is a trade association, the members of which are business users of parcel post. Association membership includes approximately 300 small and medium-sized companies all of which distribute products by parcel post. Under its constitution, the Association's objectives include the following: "to foster, protect, improve and extend the services of the United States Post Office Department in the handling of parcel post, and in the establishment and regulation of facilities, rates and services therefor" The Association does business, and has its principal office, in the District of Columbia. The Association was a party protestant on behalf of its members in the proceedings before the Interstate Commerce Commission (ICC) which resulted in the orders of which review is sought here.

5. Plaintiff Henry Field Seed and Nursery Co., Inc. (hereinafter called "Field") is an Iowa corporation engaged in the retail mail order sale of nursery stock of all kinds. Field has its principal office in Shenandoah, Iowa.

6. Plaintiff Popular Merchandise Co., Inc. (hereinafter called "Popular Merchandise") is a New York corporation engaged in the retail mail order sale of general home furnishings, appliances, and clothing. It has its principal office in Passaic, New Jersey.

7. Plaintiff Wilson Chemical Co., Inc. (hereinafter called "Wilson") is a Delaware corporation engaged in the sale by mail order of Cloverine Salve and certain other Cloverine cosmetics and medicines.

8. Plaintiffs Field, Popular Merchandise and Wilson are each members of the plaintiff Association and will be referred to herein collectively as the "mail user plaintiffs". Each mail user plaintiff delivers merchandise to its customers by parcel post. For each mail user plaintiff, parcel

post postage forms a large proportion of the cost of doing business. Each mail user plaintiff was a party protestant in the proceedings before the ICC of which review is here sought.

9. Each of the plaintiffs severally makes and files this complaint. Each of the mail user plaintiffs brings this action in its individual capacity. The Association plaintiff and each of the mail user plaintiffs brings this action on behalf of all the members of the Association plaintiff who are situated similarly to the mail user plaintiffs. Such members constitute a class within the meaning of FRCP 23 and are so numerous as to make it impracticable to bring them all before the Court. The claims of each of the plaintiffs, and of each member of the Association similarly situated, arise out of the same transactions or occurrences. There are common questions of law and fact affecting the rights of each plaintiff and each member of the Association similarly situated, and common relief is sought for each. Plaintiffs will adequately represent all members of the Association who are similarly situated.

10. Defendants Tuggle, Herring, Arpaia, Freas, Winchell, Hutchinson, Murphy, Walrath, McPherson, Goff and Webb are individuals and members of the Interstate Commerce Commission. These defendants (hereinafter called "defendant Commissioners") maintain their principal place of business in Washington, D. C. Defendant Commissioners are sued as individuals and as members of the Interstate Commerce Commission. For the purposes of this suit, defendant Commissioners reside in Washington, D. C.

11. Defendant Summerfield is an individual and he is Postmaster General. He does business in Washington, D. C., and for the purposes of this suit, he resides there. Said defendant is sued individually and as Postmaster General.

II.

STATEMENT OF THE CAUSE OF ACTION

A. *Applicable Statutory Provisions*

12. For the first time since the enactment of the Postal Policy Act of 1958, new parcel post and catalog rates have been established. By a statute first enacted in 1912 when the parcel post service was created, the Postmaster General is directed to formulate new rates of postage for the parcel post and catalog classifications of fourth-class mail whenever he "shall find" the old rates "are such as [1] to prevent the shipment of articles desirable or [2] to permanently render the cost of the service greater than the receipts of the revenue therefrom." [Act of August 24, 1912, 37 Stat. 558, 39 U.S.C. § 247] The statute requires that the new schedule of rates be submitted to the ICC which, "after investigation," must consent to them or deny its consent. (39 U.S.C. § 247) The general objectives the new rates are supposed to accomplish are "[1] to promote the [fourth-class mail] service to the public or [2] to insure the receipt of revenue from such service adequate to pay the cost thereof." (39 U.S.C. § 247)

13. Before the enactment of the Postal Policy Act of 1958, no statutory standards were provided by Congress to guide the Postmaster General and the ICC in attempting to make the findings and meet the objectives referred to in the preceding paragraph 12. In an effort to give precision to the second finding and second objective, both of which are concerned with balancing "costs" and "revenues", the Postmaster General utilized a statistical and accounting procedure called the "Cost Ascertainment System" to define the "costs" and "revenues" of fourth-class mail. The "revenues" and "costs", so defined, were used as the basis for formulating practically all fourth-class mail rates which were submitted to and approved by the ICC during the thirty years preceding the submission of the rates in question here.

14. To provide statutory standards for determining "revenues" and "expenses" for postal rate making, the Congress enacted the Postal Policy Act of 1958. By its own terms, the Act established certain "standards" for the "determination and allocation of postal revenues and expenses". [§ 103(b)(2) of the Act, 72 Stat. 135, 39 U.S.C. § 270a(b)(2)]. The Act states that "due consideration should be given" to these standards in the "determination and adjustment of the postal-rate structure". [§ 103(b)(2) and (c)(1)] One of these standards was that rates should be adjusted to account for the "priority" that first-class mail is given over all other classes of mail in handling and transportation [See § 103(c)(2)]. To pay for the "preferred service" which the Act requires to be given to first-class mail, first-class must be allocated an "additional amount" of costs representing "the fair value of all extraordinary and preferential services, facilities, and factors relating thereto." [§ 103(c)(2)] It was intended that each of the other classes of mail would be charged correspondingly less (when first-class was charged more) because Congress declared it "an unfair burden" on any class of mail users "to compel them to bear the expenses incurred by reason of *special* rate considerations or *facilities provided* to other users of mails . . ." [§ 102(5), 72 Stat. 134-135, 39 U.S.C. § 270(5) (emphasis added)].

15. Another of the "standards" for "allocation of postal revenues and expenses" contained in the Postal Policy Act is the proscription against charging mail users for the "public service" activities of the Department [§§ 103(c)(3), 102(5), 104(a), 72 Stat. 134-137, 39 U.S.C. §§ 270a(c)(3), 270(5), 270b(a)]. The Act contains a long list of services performed by the postal establishment which "shall be considered public services for the purposes of this title" [§ 104(a)]. These include, for example, carrying mail free for the blind or at reduced rates, and operating "the star route system and third- and fourth-class post offices." (*Ibid.*) The star route system is composed

of mail transportation and delivery routes operated by independent contractors, many of which serve rural areas. Third- and fourth-class post offices are small post offices usually found in rural areas. (*Ibid.*) In the "allocation of postal revenues and expenses" [§ 103(b)(2)], the losses incurred in providing these public services "should not constitute direct charges in the form of rates and fees upon any user or class of users of such public services, or of the mails generally" [§ 103(c)(3)(A)].

16. Various sections of the Act use language such as "any particular user or class of user of the mails" to indicate that they apply to all classes of mail. Fourth-class mail is referred to specifically in Section 106 which states that the Act's new standards "shall not require any downward adjustment in rates of postage on fourth-class mail existing on the date of enactment of this Act." [72 Stat. 138, 39 U.S.C. § 270(d)] As part of the same enactment which contained the Postal Policy Act, Congress amended a rider from an earlier appropriation act to provide that the Postmaster General could not withdraw funds from the Treasury until he had certified that he had requested the consent of the ICC to such rate increases "as may be necessary to insure (1) that the *revenues* from fourth-class mail service will not exceed by more than 4 per centum the *costs* thereof and (2) that the *costs* of such fourth-class mail service will not exceed by more than 4 per centum the *revenues* therefrom." [64 Stat. 1050 (1950), as amended, 72 Stat. 143, 31 U.S.C. § 695 (emphasis added)].

17. The provisions of the Postal Policy Act described in the preceding paragraphs 14 through 16, establish a right in fourth-class mail users to be relieved of charges incurred by the Postmaster General in the operation of special facilities which (1) are used primarily to provide "preferred service" to first-class mail, or which (2) are classified as "public services" by the Act.

B. Defendants' Actions of which Complaint is Made

18. On November 28, 1958, the defendant Summerfield filed an application with the ICC asking its consent to the establishment of increased rates for parcel post and catalogs. The application purported to be based upon 39 U.S.C. § 247 and 31 U.S.C. § 695, *supra*, but not on the Postal Policy Act. In language taken in part from 39 U.S.C. § 247, *supra*, the application recited that the "Postmaster General has found that the present rates of postage are such as to render the cost of fourth-class mail service greater than the receipt of revenue therefrom by approximately \$88 million." It contained no recitation concerning the other finding that may precipitate a rate increase under 39 U.S.C. § 247, to-wit, that existing rates were "such as to prevent the shipment of articles desirable". In language taken in part from 31 U.S.C. § 695, *supra*, it stated that the rate schedule which was attached to the application was designed "to insure that the revenues from fourth-class mail service will not exceed by more than 4 percentum the costs thereof and that the costs of such fourth-class mail service will not exceed by more than 4 percentum the revenues therefrom."

19. In the determination of the "revenues" and "expenses" allocable to parcel post and catalogs, and in the formulation of the rates based on these determinations, the defendant Summerfield

(a) did not give any effect to the Postal Policy Act of 1958 because he was of the view that the Act was not applicable.

(b) did not give "due consideration" or any effect to the "priority" and preference which first-class mail is given by the postal establishment in handling and in transportation [§§ 103(c)(1)(H) and 103(c)(2) or the Postal Policy Act.]

(c) did not allocate any "additional amount" to first-class mail costs to represent the "fair value" of all "extraordinary and preferential" services and facilities which first-class mail receives [§ 103(c)(2)].

(d) did not reduce the amount of expense allocated to fourth-class mail (including the costs allocated to parcel post and catalogs) to account for the "additional amount" which should have been allocated to first-class mail [§§ 102(5) and 103(c)(2)].

(e) included in the rates an amount representing a share of the cost of the "special facilities" which are provided by the postal establishment primarily to give first-class mail "preferred service." [§§ 102(5) and 103(c)(2)].

(f) did not treat the star route system and third- and fourth-class post offices as public services [§ 104(a)(2)].

(g) did not make any determination of the dollar amount of the losses incurred in providing the "public services" defined as such in the Postal Policy Act, including in particular the losses on the star route system and third- and fourth-class post offices [§ 104(a)].

(h) did not eliminate from the costs allocated to fourth-class mail (including the costs allocated parcel post and catalogs) any amount representing the losses incurred in providing the "public services" defined as such in the Postal Policy Act [§§ 104(a), 103(c)(3)(A)].

(i) included in the rates an amount representing a share of the losses incurred in operating the star route system and third- and fourth-class post offices [§§ 104(a)(2), 103(c)(3)(A)].

(j) did not make any finding that the existing rates were such as "to prevent the shipment of articles

desirable" or any other finding to this effect (39 U.S.C. § 247).

20. On December 12, 1958, plaintiff Association filed with the ICC a petition to dismiss the defendant Summerfield's rate increase application, or to defer its consideration until he submitted a valid rate schedule. This petition contended that he could not propose, and the defendant Commissioners could not consider, rates formulated in contravention of the Postal Policy Act. It also contended that the rates he had proposed had been so formulated. The mail user plaintiffs later filed a protest in which they joined in the Association's petition. On January 15, 1959, Commissioner Richard F. Mitchell denied the petition by deferring consideration of it until the end of the hearing which had been scheduled. The plaintiff Association and the member plaintiffs thereupon sought immediate reconsideration of this order by all of the defendant Commissioners. In their petition for reconsideration, plaintiffs alleged that the rates were void in that they had been prepared without regard to, and in contravention of the Postal Policy Act. Plaintiffs also alleged that the defendant Summerfield had no power to apply for such rates, and that the defendant Commissioners had no power to hear or consent to his application. The defendant Commissioners, without authority of law, failed and refused to grant reconsideration before, during, or after the hearing.

21. The plaintiff Association and the mail user plaintiffs appeared at the hearing and opposed the application on the grounds they had urged in their petition for reconsideration as described in the preceding paragraph 20. In addition, they urged that the formulation, approval and promulgation of the rates would be arbitrary, capricious, without rational basis, and without authority of law for the following reasons:

(1) Even if the Postal Policy Act were not applicable, the rates would overcharge parcel post and catalogs with approximately \$100 million in postal costs; and

(2) Promulgation of the rates would result in diversion of a substantial flow of parcel post and catalog mail from the Post Office Department to other means of transportation, thus reducing postal revenues and producing a deficit.

22. In an order dated March 2, 1959, the defendant Commissioners' agent, ICC Hearing Examiner Fuller, issued an order stating that "the Department is requested to furnish to the Commission and to protestants' cost consultants, on or before April 15, 1959, the best data obtainable to determine the cost of the 'extraordinary and preferential services and facilities accorded first-class mail,' which protestants contend should not be included in the cost of the fourth-class mail, and to determine the loss, if any, from the operation of the star route system and third- and fourth-class post offices." When the defendant Postmaster General arbitrarily refused to comply with this order, the defendant Commissioners and their agent, without authority of law, made no further effort to achieve compliance with its terms, despite requests by plaintiffs that they do so.

23. In proposed findings, exceptions, brief, and oral argument, plaintiff Association and plaintiffs Field and Popular Merchandise advanced the arguments referred to in the preceding paragraphs 20 through 22 and contended in addition that defendant Commissioners had no power to issue a report in this case which did not contain findings explaining how each material issue raised by the parties had been treated.

24. On November 20, 1959, the defendant Commissioners issued a report and order consenting to the rate schedule submitted to it by the defendant Summerfield and denying plaintiffs' petition to dismiss. While defendant Commissioners report indicates their view that the Postal Policy Act is applicable, they gave no effect to its provisions. The

report did not contain sufficient findings explaining how each material issue raised in the exceptions of the parties had been treated. Instead, it contained general language stating: "Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified." The order of the defendant Commissioners denying plaintiffs' petition to dismiss and consenting to the new rates is final.

25. On or about November 23, 1959, the Postmaster General entered a final order placing the new rates into effect on February 1, 1960.

C. Grounds for Relief

26. Exaction of the new rates from plaintiffs as a condition to their use of the fourth-class mail service will violate their rights described in paragraph 17 above.

27. The defendant Summerfield exceeded his statutory authority in the formulation of the rates by failing to comply with the Postal Policy Act, and by contravening explicit commands contained in that Act in the following sections: §§ 102(5); 103(b)(2); 103(c)(1); 103(c)(2); 104(a). These sections are quoted in the preceding paragraphs 14-16.

28. By failing to follow the "standards" for the "allocation of postal revenues and expenses" contained in the Postal Policy Act, and by failing also to find that the existing rates "are such as to prevent the shipment of articles desirable" within the meaning of 39 U.S.C. § 247, the defendant Summerfield failed to make valid findings pursuant to either of the two alternative bases for rate reformations set forth in 39 U.S.C. § 247. In so doing, he exceeded his statutory power.

29. By failing to follow the Postal Policy Act "standards" for the "allocation of postal revenues and expenses"

in his determination of the "revenues" and "costs" of fourth-class mail pursuant to 31 U.S.C. § 695, the defendant Summerfield exceeded his statutory power under this provision.

30. Neither defendant Summerfield nor defendant Commissioners have any delegated power to reform the rates for parcel post and catalogs other than that set out in the Postal Policy Act, 39 U.S.C. § 247, and 31 U.S.C. § 695. By formulating and establishing rates without complying with these provisions, defendant Summerfield usurped the constitutional ratemaking power of Congress which is implicit in its power to "establish post offices and post-roads." (Const. of U. S., Article I, Section 8, Clause 7.) Defendant Summerfield acted without authority of law and in violation of this provision of the Constitution.

31. For the reasons stated in paragraphs 21, and 26 through 30, the rates, and defendant Summerfield's order placing them into effect, are arbitrary, capricious, invalid, without rational basis, without authority of law, and in violation of Amendment V to the United States Constitution.

32. Because the rates submitted to them were void as set out in the next preceding paragraph, the defendant Commissioners exceeded their power by entertaining the rate application, by failing to require the defendant Postmaster General to supply information on the effect the Postal Policy Act would have had on the rates, by failing to act before or during the hearing on plaintiffs' petitions to dismiss and for immediate reconsideration, and by denying these pleadings and granting consent to the promulgation of the rates. Defendant Commissioners, by these actions—

(a) failed to comply with the Postal Policy Act, contravened the explicit provisions of the Act set forth in paragraph 27 above, and exceeded their statutory power under that Act;

(b) by failing to follow the Postal Policy Act's "standards" for the allocation of postal "revenues" and "expenses" in their determination of the "revenues" and "costs" of fourth-class mail pursuant to 39 U.S.C. § 247 and 31 U.S.C. § 695, exceeded their statutory power under these provisions;

(c) by consenting to fourth-class mail rates without following applicable statutory standards therefor, acted without authority of law and in violation of Article I, Section 8, Clause 7 of the Constitution of the United States;

(d) by failing to complete a full "investigation," including an investigation of all of the public service losses and first-class preference costs allocated to fourth-class mail, exceeded their statutory power under 39 U.S.C. § 247;

(e) by failing to make findings showing their disposition of all material issues raised by the parties, acted arbitrarily and capriciously; and

(f) for all the reasons listed in sub-paragraphs (a) through (e) above, and for the reasons listed in paragraph 21 above, acted arbitrarily, capriciously, without rational basis, without authority of law, and in violation of Amendment V to the United States Constitution.

D. Need for Injunctive Relief and Declaratory Judgment

33. The rate increases will cause serious and irreparable injury to the plaintiff Association, to the mail user plaintiffs, and to all members of the Association who are similarly situated to the mail user plaintiffs. Some of these members are threatened with destruction of their businesses and effective exclusion from the parcel post service by the rates.

34. The rate increases could not go into effect but for the orders of the defendant Commissioners consenting to the defendant Summerfield's application and denying plaintiffs' petitions. These orders therefore will cause serious and irreparable injury to the plaintiff Association, to the mail user plaintiffs and to all members of the Association similarly situated to the mail user plaintiffs.

35. Neither plaintiff Association nor the mail user plaintiffs nor any member of the plaintiff Association has an adequate remedy at law. Plaintiffs have exhausted their administrative remedies.

36. A genuine, present and substantial controversy exists between plaintiffs and defendants as to the existence of plaintiffs' rights and the validity of defendants' actions. It is necessary for the protection of plaintiffs' rights that this Court declare those rights. A judgment of this Court declaring the existence of plaintiffs' rights and the validity of defendants' actions will terminate the controversy.

III.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray:

1. That the Court issue its summons directed to defendants commanding them to appear and answer the allegations herein and to perform such orders and decrees as the Court may make in the premises.

2. That the Court grant such preliminary relief as may be hereafter sought by plaintiffs and as the nature of the case may require.

3. That upon final hearing the Court

- a. Adjudge and decree that the rates are invalid because they were formulated in contravention of applicable statutory standards and without authority of law.

b. Adjudge and decree that the defendant Commissioners had no power to consider or consent to the rates, and that the defendant Summerfield has no power to put them into effect.

c. Set aside and annul the defendant Commissioners' action granting consent to the proposed rates.

d. Issue an injunction restraining the defendant Commissioners from again consenting to the rates.

e. Issue an injunction restraining the defendant Summerfield from placing the rate increases into effect.

f. Grant such other relief as the nature of the case may require and as may to the Court seem just.

Respectfully submitted,

ROY C. FRANK
Barr Building
Washington 6, D. C.
General Counsel
Parcel Post Association

/s/ ROY C. FRANK
Roy C. Frank

ARNOLD, FORTAS & PORTER
1229 Nineteenth Street, N.W.
Washington 6, D. C.

Special Counsel
Parcel Post Association

By /s/ PAUL A. PORTER
Paul A. Porter

Attorneys for Plaintiff

Dated:
December 1, 1959

Filed December 1, 1959

(Caption omitted)

Motion for Preliminary Injunction

Plaintiffs, Parcel Post Association, Inc., Henry Field Seed and Nursery Co., Inc., Popular Merchandise Co., Inc., and Wilson Chemical Co., Inc., move the Court for a preliminary injunction restraining the defendant Summerfield, his employees, and all persons acting under his authority and control, during the pendency of this action, from placing into effect the new postage rates for two-sub-classifications of fourth-class mail, parcel post and catalogs, contained in his order published in the Federal Register for November 25, 1959 (24 Fed. Reg. 9477), to be effective February 1, 1960.

In support of the foregoing Motion, plaintiffs state, as is more fully shown in the Affidavits and the Memorandum of Points and Authorities attached hereto, that:

1. Plaintiffs are an association of mail order companies which use parcel post to ship their products to customers, and three members of this association. The new postage rates will cause irreparable injury to the three mail order company plaintiffs and to other members of their association who are similarly situated.

2. The defendant Summerfield is Postmaster General. He exceeded his power by formulating the new postage rates without authority of law and in contravention of the express commands of the Postal Policy Act of 1958. He regarded this Act as inapplicable and gave no effect whatever to its provisions.

3. In the Postal Policy Act of 1958, Congress created rights in fourth-class mail users to be free of any charges for the costs incurred by the Postmaster General in the operation of (a) the special facilities designed to provide "preferred service" to first-class mail as required by the

Act, and (b) the "public services" designated as such in the Act.

4. By formulating and promulgating postage rates which would include charges for these costs, defendant Summerfield violated plaintiffs' rights.

5. The Court has authority to take jurisdiction of this matter, to declare plaintiffs' rights, and to issue an injunction. Plaintiffs have standing and the suit is not against the United States. Plaintiffs have no adequate remedy at law.

Respectfully submitted,

ROY C. FRANK
Barr Building
Washington 6, D. C.

General Counsel
Parcel Post Association

/s/ ROY C. FRANK
Roy C. Frank

Attorneys for Plaintiff

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1229 Nineteenth Street, N.W.
Washington 6, D. C.

Special Counsel
Parcel Post Association

By /s/ PAUL A. PORTER
Paul A. Porter

Dated:
December 1, 1959

Affidavit of George Bunn

GEORGE BUNN, being duly sworn, deposes and says:

1. I am an attorney, admitted to the bar of the United States District Court for the District of Columbia on November 3, 1950. I am associated with the firm of Arnold, Fortas & Porter and was one of the counsel for the Parcel Post Association and certain of its members in the proceeding before the Interstate Commerce Commission entitled *Increased Parcel Post Rates, 1957*, Docket No. 32158. I am familiar with the record in this docket.

2. The proceeding began with the filing of an application by the Postmaster General on April 18, 1957. This application requested the Commission to institute the proceedings necessary to give its consent to increased rates or other reformatations on fourth-class mail. The Postmaster General, by his counsel, represented that such rates or other reformatations would be submitted at a later time.

3. By order of May 20, 1957, the Commission instituted an investigation and ordered that the "proceeding be assigned for hearing at a time and place to be hereafter designated."

4. On November 28, 1958, the Postmaster General, by his counsel, filed an amended application seeking increased rates on the parcel post and catalog classifications of fourth-class mail. These two classifications accounted for over 94% of the costs allocated to fourth-class in the base year fiscal 1957, parcel post accounting for about 90% and catalogs about 4%. The Postmaster General's application contained the schedule of rates which was later approved by the Commission and ordered to become effective February 1, 1960, by the Postmaster General. The application stated:

Comes now the Postmaster General, by his Counsel, and, pursuant to the general provision relating to the Post Office Department contained in Chapter IV of the

Supplemental Appropriation Act, 1951, approved September 27, 1950, as amended by Section 213 of the Postal Rate Increase Act, 1958, approved May 27, 1958 (64 Stat. 1050, 72 Stat. 143, 31 U.S.C. 695) and Section 207 of the Act of February 28, 1925, as amended (43 Stat. 1067, 45 Stat. 942, 39 U.S.C. 247), hereby requests the consent of the Commission to the establishment of rate increases and other rate reformatations necessary to insure the receipt of revenue from fourth-class mail service sufficient to insure that (1) the revenues from fourth-class mail service will not exceed by more than 4 percentum the costs thereof and (2) that the costs of such fourth-class mail service will not exceed by more than 4 percentum the revenues therefrom. In support of said request the Postmaster General respectfully states that:

I

Based on experience as to the cost of providing the fourth-class mail service, as reflected by available data derived from the ascertainment of the cost of providing such service for the fiscal year ending June 30, 1957, and developments which have substantially increased the cost of fourth-class mail service since the end of the fiscal period covered by said ascertainment, including the prescription by the Interstate Commerce Commission of increased compensation, rates, and charges for the transportation of United States mail by railroad and increases in postal expenditures and other changes resulting from the enactment of Public Law 85-426, 85th Congress, approved May 27, 1958, and Public Law 85-462, 85th Congress, approved June 20, 1958, the Postmaster General has found that the present rates of postage are such as to render the cost of fourth-class mail service greater than the receipt of revenue therefrom by approximately \$88 million.

II

Accordingly, the Postmaster General has formulated proposed rate schedules on fourth-class mail necessary to insure that the revenues from fourth-class mail service will not exceed by more than 4 percentum the costs thereof and that the costs of such fourth-class

mail service will not exceed by more than 4 percentum the revenues therefrom, said rate increases and other rate reformatations being set forth in the schedules attached hereto and made a part hereof.

WHEREFORE, the Postmaster General hereby submits said proposals for rate increases and other rate reformatations, and respectfully requests that the Commission consent thereto after investigation, as contemplated by the applicable statutes.

5. On December 12, 1958, the Parcel Post Association requested the Commission to dismiss this application on the ground that the rates it contained had been formulated in violation of the Postal Policy Act of 1958. This petition was later joined in by certain members of the Association, including Henry Field and Seed Co., Inc., Popular Merchandise Co., Inc., and Wilson Chemical Co., Inc. The petition included the following allegation (p. 15):

"... the Parcel Post Association has been informed by representatives of the Department and therefore alleges that in establishing the proposed new schedule, the Postmaster General did not determine, pursuant to the Act, the amount of credit to fourth-class mail for public service items or the additional operating costs of the postal establishment which should be allocated to first-class mail, rather than fourth-class mail."

6. In his reply, dated December 23, 1958, to this petition, the Postmaster General did not deny this allegation. The reply did state that "only one of these public service items, i.e., Sec. 104(a)(2), the loss resulting from the operation of the star route system and third- and fourth-class post offices, could have any conceivable effect upon the subclassifications of fourth-class mail subject to the Postmaster General's delegated authority [i.e., parcel post and catalogs]. All other public service items listed in Public Law 85-426 apply to mail other than that affected by a change in parcel post and catalog rates." (p. 16). In general,

the reply argued that the provisions of the Postal Policy Act were not applicable to fourth-class mail rate reformation proceedings by the Postmaster General. Thus, the reply took the position (p. 14):

"... Congress, although adopting certain policies as set forth in the [Postal Policy] Act, fully reserved to itself the implementation of these policies, and has in no wise changed its standards controlling the limited authority delegated to the Postmaster General with respect to the reformation of rates and other conditions of mailability pursuant to 31 U.S.C. 695 and 39 U.S.C. 247."

7. By order of January 15, 1959, the Commission, by Commissioner Richard F. Mitchell, effectively denied the petition to dismiss by deferring action on it until after completion of the hearing.

8. In a petition, dated February 4, 1959, seeking immediate reconsideration by the full Commission of this action, the Parcel Post Association, Henry Field Seed and Nursery Co., Inc., Popular Merchandise Co., Inc., and Wilson Chemical Co., Inc., and other members of the Association, argued that the Postmaster General had violated express requirements of the Postal Policy Act in formulating the rate schedule, that the schedule was thus void, and that the Commission therefore had no power to entertain the application further.

9. By reply, dated February 24, 1959, the Postmaster General again took the position that the Act was not applicable to fourth-class mail rate reformation proceedings before the ICC.

10. Neither the petition to dismiss nor the petition for immediate reconsideration were acted upon by the full Commission until the Commission's final Report and Order, decided November 17, 1959, in which the petition to dismiss was denied.

11. On March 2, 1959, ICC Hearing Examiner Burton Fuller issued an order stating:

"The petition of protestant Parcel Post Association, referred to in the order of January 15, 1959, which petition was later joined in by certain other protestants, raises the primary question as to what effect, if any, Public Law 85-426, particularly Sections 103(c)(2) and 104(a)(2) thereof, has upon the determination of the cost of the fourth-class mail considered in this proceeding.

In order to assist the Commission in resolving this question, and pursuant to the discussion at the pre-hearing conference and the views of the examiner expressed thereat, the Department is requested to furnish to the Commission and to protestants' cost consultants, on or before April 15, 1959, *the best data obtainable to determine the cost of the "extraordinary and preferential services and facilities accorded first-class mail, "which protestants contend should not be included in the cost of fourth-class mail, and to determine the loss, if any, from the operation of the star route system and third- and fourth-class post offices. . . ."* (Emphasis added)

12. By letter, dated March 24, 1959, to Examiner Fuller, counsel for the Postmaster General declined to comply with the provisions of the Examiner's order quoted in the preceding paragraph, on the ground, among others, that the Postal Policy Act could only be administered by Congress and was therefore not applicable in a fourth-class rate reformation proceeding before the ICC.

13. After receiving the letter of March 24, 1959, from counsel for the Postmaster General, the Examiner made no effort to seek compliance with the provisions quoted above from his order of March 2, 1959, despite requests by counsel for plaintiffs that he defer hearing until compliance with the order had been achieved. Such requests were made in a letter to the Examiner dated April 9, 1959, and in a conference immediately after that date.

These requests were effectively denied by an order of Commissioner Mitchell, dated April 21, 1959, scheduling further hearing for June 2, 1959. The record contains no cost study showing the *total amount* of the costs and losses described in the quotation from the order of March 2, 1959, set forth in paragraph 11 above.

14. On or before the first hearing day, appearances in opposition to the Postmaster General's application were entered on behalf of the Parcel Post Association, Inc., Henry Field Seed and Nursery Co., Inc., Popular Merchandise Co., Inc., and Wilson Chemical Co., Inc.

15. The Postmaster General's evidence was directed primarily toward proving that, based on fiscal 1957, an \$88 million deficit existed between parcel post and catalog allocated revenues and allocated costs. This showing was derived from the results of the Postmaster General's Cost Ascertainment System for fiscal 1957, with certain adjustments for recent increases in personnel and transportation costs. During the course of the hearings, Irving I. Raines, then Director of the Division of Postal Rates, Bureau of Finance, Post Office Department, testified that he developed the Postmaster General's rate proposals using the costs allocated to parcel post and catalogs by the employees of the Department responsible for Cost Ascertainment (Tr. 120-123). He testified further (Tr. 156-157):

Q. [By Mr. Paul Porter] . . . Did you consider the relationship of the Postal Policy Act of 1958 to these rate proposals?

A. Yes, sir.

Q. Now tell us what consideration you gave to it.

A. Well, the question of course was whether or not the Public Law 85426 had any impact or any bearing upon these proceedings, and, if so, in what respect? And of course this was primarily a legal question and these discussions took place with our legal counsel and with other competent parties in the Post Office Department.

The general conclusion was that they had no direct bearing except to the extent that the cost coverage limit was extended from zero percent, you might say, to plus or minus four percent. [This has reference to an amendment to 31 U.S.C. §695 which was actually not contained in the Postal Policy Act itself but in another title of the same enactment (Title II of P.L. 85-426). This amendment requires the Postmaster General, before withdrawing funds from the Treasury, to certify that he has sought ICC approval of fourth-class mail rates which will produce revenues within 4 percent of costs.]

Q. But you were instructed then by counsel or were advised by counsel *that you need not take into consideration* other provisions of the Postal Policy Act?

A. That is exactly correct, yes.

Q. Was this an informal—

A. Yes.

Q. —advice? It was not in the form of a written legal opinion?

A. No, sir, it was an informal advice. We operate on a sort of committee basis in developing a—

Q. And counsel were present at these committee deliberations?

A. Yes.

Q. Without trying to penetrate, if there is a privilege, the lawyer-client privilege, were you told for example *you need take into account no preference for first-class mail*?

A. Well, I think that was inherent in the development of the costs which were transmitted to me for the purpose of rate making, and these decisions were made over a period of time and undoubtedly incorporated into the entire case.

Q. And you *did not take that into consideration at all*?

A. That is right. In setting rates, that is right. (Emphasis added)''

16. After a series of questions concerning whether Dr. Raines had before him, when he formulated the rates, "any studies" of particular rate making factors referred to in the Postal Policy Act he was asked (Tr. 136):

Q. [By Mr. Paul Porter] How about studies with respect to the priority in handling first-class mail, as compared with parcel post?

A. No sir, my function is primarily an exercise in adjusting rates to secure a given cost coverage.

17. Another principal witness for the Postmaster General was Edmund J. Walsh, then Assistant Controller, Post Office Department, under whose direction the cost allocations used in justifying the rates were prepared. During cross-examination, he testified as follows (Tr. 89-90, 93, 97):

Q. [By Mr. Paul Porter] Now, have the star route system and the third and fourth class post offices *been treated as public service functions* in the cost computations underlying this proposed rate structure?

A. No, sir.

Q. They have not been treated as public service?

A. They have not.

.

Mr. Porter: In the first statement of allotment accounts, would you read into the record at this point the amount allotted to parcel post and to fourth-class mail of star route service—costs?

The Witness: That shows that the star route total expenses for star route service, \$42,492,770, \$26,619,753 *were allocated to fourth-class mail* of those costs for service of transporting mail in star routes.

Q. So those costs are reflected in this proposed rate structure and *are to be borne by the parcel post and catalog users*?

A. Yes, sir, *we have included all the costs of the functional elements of the postal service* in here as stated in our revenue and expense accounts.

Q. Including third and fourth class post offices and star routes?

A. Yes, sir.

Q. Now, have any deductions been made in the 1957 cost ascertainment reports for any loss incurred in the operating of the star route system?

A. No, there is no loss determined for that.

Q. And is your answer the same for third and fourth class post offices?

A. That is correct.

* * * * *

Q. [By Mr. Paul Porter] Did you take into consideration any additional amount of expense to be allocated to first class mail because of the preferred service it receives?

A. No, sir, no reallocation of costs has been made for that purpose.

* * * * *

Q. [By Mr. Paul Porter] I take it, Mr. Walsh, your testimony is, then, *that no effect or consideration was given to any provision of Title I of Public Law 85-426 [the Postal Policy Act] in the reformation of this rate structure?*

A. I think that would be correct, particularly with respect to sections 1, 2, 3 and 4. (Tr. 97) (Emphasis added)

18. After the Postmaster General failed to comply with the provisions quoted in paragraph 11 above from the Examiner's order of March 2, 1959, the Parcel Post Association offered certain estimates concerning the effect the Postal Policy Act would have had if it had been followed in the formulation of the rate schedule. These estimates were made by Price Waterhouse & Co., professional public accountants. In 1953, before the Postal Policy Act was adopted, this firm had made a study of the effect on cost allocations of the preferred service given first-class mail. This study was done for the Senate Post Office and Civil Service Committee's Advisory Council and appears in *Postal Rates and Postal Policy of the Post Office Department*, Report of the Committee on Post Office and Civil Service pursuant to S. Res. 49, Sen. Rep. No. 1086, 83rd Cong., 2d Sess., pp. 36-39 (1954). The study assumed that the "basic purpose of the Post Office Department is to handle first-class mail and that all other classes should be charged only with the direct or incremental costs occa-

sioned by them." (Ex. 1 hereto). Based on this assumption, the study concluded that for the fiscal year 1952 \$276 million charged to fourth-class mail by the Department's Cost Ascertainment System should be shifted to first-class mail. A true and correct copy of this study is attached hereto as Exhibit 1.

19. At the hearing, Theodore Herz, a partner in Price Waterhouse & Co. who had participated in the 1953 Price Waterhouse study, testified concerning the effect that following the Postal Policy Act might have had upon the costs which formed the basis for the parcel post and catalog rate schedule. True and correct copies of his statement and of a letter from his firm on which his statement is based are attached hereto as Exhibits 2 and 3. Both of these exhibits were admitted into evidence in the ICC proceeding. Mr. Herz estimates are based in large part on testimony given by Maurice H. Stans, when he was Deputy Postmaster General, before the Senate Committee on Post Office and Civil Service. This testimony is quoted in part at pp. 9-10 of Exhibit 3. The total cost effect of the several examples cited in Mr. Herz testimony would reduce the costs allocated to fourth-class mail for fiscal year 1957 by \$86 million or more in his opinion. (Ex. 2, pp. 17-18)

20. At the hearing, in proposed findings, exceptions and in oral argument, the Parcel Post Association, et al., argued that the Postal Policy Act prohibited charging fourth-class mail users with the losses incurred in the operation of the "public services" designated as such in Postal Policy Act, or with the extra costs incurred in the operation of the special facilities used to give first-class mail "preferred service." The Postmaster General contended, on the other hand, that his "Cost Ascertainment System" properly charged fourth-class mail with a share of *all* postal facilities based on the amount that fourth-class mail actually used those facilities.

21. In the case of first-class preference, the Association, et al., based its arguments in part on a statement of the then Deputy Postmaster General, Maurice H. Stans. This statement was part of the legislative history of the Postal Policy Act. Mr. Stans stated in part:

“[F]irst-class mail receives priority in handling *over every other class of mail* while in post offices and in transit. There are many operations of the postal service *geared to first-class mail exclusively*. The Post Office incurs *many extra expenditures* because of this treatment. Some specific examples are: [These examples are listed, in Mr. Stans' language, in Exhibit 3 hereto, pp. 9-10].

“The costs of the above services, along with others, that could be cited are charged over all classes of mail on a use basis [i.e., in proportion to the amount the class actually uses the facility]. If the mail service were *not geared to the expedited movement of first-class communications*, these costs would not be incurred at all. *It is only fair to relieve the other classes of mail of such costs*, and to charge them wholly to first-class mail for rate making purposes.” [Hearings before a Subcommittee of the Committee on Post Office and Civil Service, U.S. Senate, 85th Cong., 1st and 2d Sess., on H.R. 5836, et al., pp. 29-30 (1958) (emphasis added)].

22. Based on the Postal Policy Act and this testimony, the Association, et al., argued that fourth-class mail could not be charged with any share of the *extra* costs resulting from expedited schedules designed primarily to meet first-class mail's needs, even though fourth-class mail might actually be expedited in some cases because it travelled or was handled with first-class mail. The Postmaster General answered that the “Cost Ascertainment System” correctly charged fourth-class mail with a share of the extra costs of the special facilities used to provide expedited treatment, the share being based on the amount that fourth-class actually used these facilities.

23. The Commission resolved this issue in the Postmaster General's favor. A true and correct copy of its report and order decided November 17, 1959, and released November 20, 1959, is attached hereto, marked Exhibit 4. Under the heading "Ultimate Findings", the Commission concluded, among other things (p. 26):

"(C) That such [fourth-class mail] allocated costs do not include any substantial proportion of the costs *which should be allocated, within the meaning of the Postal Policy Act of 1958—*

(1) To the preferred service accorded first-class mail.

(2) To the public services designated in said Act." (Emphasis added)

24. Based on the language in the opinion relating to this conclusion, the Commission appears to have meant that the Postal Policy Act did not prohibit the Postmaster General from charging fourth-class mail with a share (based on the amount of fourth-class use) of the costs of the public services which are designated as such in the Act, or of the special facilities which Mr. Stans said were set up solely or primarily to expedite first-class mail. In the opinion, the Commission said, for example, (p. 16):

"Although there is some conflict in the legislative history with respect to these matters, we believe that the allocation of the costs of these operations [the public service items—star route system and third- and fourth-class post offices] to fourth-class mail *to the extent that they are used thereby is in conformity with the Act.*" (Emphasis added)

25. In the case of first-class preference, the Commission also held it fair to charge fourth-class with a share (based on the amount of fourth-class use) of the special facilities which Mr. Stans said were geared to first-class mail needs. For example, a protestant introduced evidence (not contradicted by the Postmaster General) that the proposed rates

would charge over \$13 million to fourth-class mail for the night differential and overtime pay expenditures of the postal establishment. Deputy Postmaster General Stans listed these as among the "many operations of the postal service geared to first-class mail exclusively" (par. 21, above). He stated, among other things, that there "is only one primary reason for working employees in the evening and that is to move first-class mail. If it were not necessary to expedite first-class mail, post offices could be operated on an 8-hour day, following the practice in industry." (Ex. 3 hereto, p. 9) The Commission's opinion does not dispute that fourth-class mail was charged \$13 million for night differential and overtime pay. The opinion states that fourth-class mail "is handled, particularly in larger post offices, entirely separate from the first-class mail, and the night work performed thereon is due to the necessity of keeping it moving and not at all to the requirements of the first-class mail." (p. 14) Thus, because fourth-class mail actually *uses* overtime and night work, the Commission held that fourth-class mail may properly be charged with the full cost of its use thereof, even though, according to Deputy Postmaster General Stans, if "it were not necessary to expedite first-class mail, post offices could be operated on an 8-hour day, following the practice in industry."

26. In the case of certain of the special facilities listed by Mr. Stans as designed to expedite first-class mail, the Commission also said, among other things (p. 15):

"None of the service rendered fourth-class mail under the first three items listed above [i.e. (1) night differential and overtime pay; (2) second and third deliveries in business areas; and (3) vehicle, star route, and mail messenger service] could have been rendered at any less expense regardless of the service accorded first-class mail."

27. This language points out that the service *actually* rendered fourth-class (which is frequently expedited be-

cause it travels with or is handled with first-class) could not have been rendered at less expense even if first-class mail had not been expedited. Thus, for example, to give fourth-class mail two deliveries per day in certain areas may be expensive, but the expense cannot ordinarily be reduced without reducing the service actually rendered to fourth-class, regardless of what is done with first-class. Because fourth-class mail sometimes rides on the second delivery truck, it is charged by the Cost Ascertainment System with a full share of the cost of the truck and its driver based on the amount of this use. This is true even though, according to Deputy Postmaster General Stans, the "only purpose of the second and third delivery trips is to expedite delivery of first-class letters . . .". (Ex. 3, hereto, p. 9) The language quoted in the preceding paragraph 26 indicates the Commission's view that as long as fourth-class mail is in fact given extra service (for whatever reason) the cost of this service could not be reduced without reducing the *amount* of the service. A charge to fourth-class mail for the extra service is therefore proper under the Commission's decision (even though the extra service would not be given, according to Mr. Stans, but for first-class mail's needs.

28. The Commission's language quoted in paragraph 26 could not mean that if there were *no* expedited service, fourth-class mail costs would remain the same, because that meaning is directly contrary to Deputy Postmaster General Stans' statement (on which the Commission's language is purportedly based) and directly contrary to the Postmaster General's cost witness, Mr. Walsh. Mr. Stans said of the three classifications of special facilities referred to in the Commission's statement: "If the mail service were not geared to the expedited movement of first-class communications, *these costs would not be incurred at all.*" (See par. 21 above) Mr. Walsh said: "The figures used in these examples [by Deputy Postmaster General Stans] were estimates of amounts by which total postal

costs *might be reduced* if operating structures and procedures were designed to meet the requirements of handling, transporting and delivering the total physical volume of mail on less frequent and less expeditious schedules than at present." (Letter of March 24, 1959, p. 9, which was received in evidence in the ICC proceeding.) Thus, if scheduling were less frequent and less expeditious than is required for first-class mail, total postal costs, and therefore fourth-class mail's allocation, would be reduced.

29. The Postmaster General did not supply, the Commission did not produce, and the record does not contain, evidence showing the total amount of the extra costs required to give first-class mail preferred service, or the amount thereof charged to fourth-class mail. However, in the case of some of the examples of the special facilities which Deputy Postmaster General Stans said were provided to give expedited treatment to first-class mail, the Postmaster General's own exhibits show that a substantial charge is made to fourth-class mail. "Vehicle service", "star route service" and "mail messenger service" are all in this category. (See Ex. 3, p. 10) A true and correct copy of a table from an exhibit offered and received to support the Postmaster General's application is attached hereto marked Exhibit 5. It shows the following (figures have been rounded):

	Total Expenditures (Millions)	Amount Charged to Fourth- class (Millions)	% Fourth- Class of Total	Citation
Star Route Service	\$42.5	\$26.6	62.7%	Ex. 5, L. 47
Vehicle Service	79.1	39.3	49.7%	Ex. 5, L. 16
Mail Messenger Service	19.6	12.1	61.5%	Ex. 5, L. 19
TOTALS	<u>\$141.2</u> (millions)	<u>\$78.0</u> (millions)	<u>55%</u>	

30. In the case of these three special facilities, the Commission said that "the amount suggested [by protestants] to be transferred [from the fourth-class to the

first-class mail cost allocation] is based on a percentage of the principal account, \$31 million, namely, 60 percent, which is a greater percentage of this amount than was allocated to fourth class in the first instance". (p. 15) No finding concerning the amount that was actually charged to fourth-class by the Cost Ascertainment System, whether 60% or something less, appears in the Commission's decision. Mr. Herz' opinion was that roughly 48%, (not 60%), was charged and should be transferred from fourth-class to first-class. (Ex. 2, p. 13) The table which is included in the preceding paragraph indicates that fourth-class was charged an average of about 55% for these three activities. Using this percentage of the amount (\$31 million) which Mr. Stans said represented part of the fiscal 1956 costs which "would not be incurred at all" if the "mail service were not geared to the expedited movement of first-class communications" (par. 21 above) yields about \$17 million. Thus, the quotation from the Commission's opinion does not preclude transferring \$17 million from fourth-class to first-class. The only reason the Commission did not do so, so far as appears from its opinion, was its conclusion that the Postal Policy Act did not prohibit charging fourth-class mail with a share of the extra costs of the special facilities designed to give first-class mail preferred service.

31. Other special first-class facilities listed by Deputy Postmaster General Stans were also discussed by the Commission (p. 15):

"With respect to the railway and highway post office service [described by Mr. Stans as 'set up solely for the purpose of expediting delivery of first-class mail' at an extra cost of \$86 million per year (Ex. 2 hereto, p. 10)] assuming that, if it were not for the requirements of the first-class mail, the fourth-class mail could have been served by the less expensive storage and truck service, the *portion* of the \$24 million to be transferred from fourth-class to first-class for this reason *would not be substantial*. It would be represented principally by the amount of the line-haul

distribution expense apportioned to fourth-class." (Emphasis added)

32. Neither this nor other language of the Commission's opinion finds that fourth-class mail is not charged significant amounts for railway post office and highway post office service. Considering only one part of the cost of these services, the "line-haul distributing expense" referred to by the Commission, the Department's exhibits show that fourth-class is charged \$9.1 million for "Distribution Space" on railway post office cars. (Post Office Department Exhibit 2 in the proceeding below, p. 96, Tab 71, Col. 14; p. 97, Chart 5.) This is one part of the "line-haul distribution expenses" the Commission referred to. Others are the distribution space in highway post offices, and the salaries, etc. of distribution employees in both facilities. Neither the total amount nor all the individual elements of the expense to which the Commission referred appear in the record. No definition of the Commission's words "substantial" and "portion" was given in the Commission's opinion. The Commission appears to have meant that \$9.1 million was not a "substantial portion" of \$24 million since it was less than one-half. The only reason the Commission did not transfer at least the \$9.1 million from fourth-class to first-class costs is, so far as appears from the opinion, its conclusion that the Postal Policy Act permitted a charge to fourth-class for a share of the extra expense incurred for facilities designed to expedite first-class movement.

33. The Postmaster General has issued an order making the new rates for parcel post and catalogs effective February 1, 1960. [24 Fed. Reg. 9477 (November 25, 1959)]. The order provides in part as follows:

"Fourth-Class Mail Increased Postage Rates

"Pursuant to the general provisions relating to the Post Office Department contained in Chapter IV of the Supplemental Appropriation Act of 1951, ap-

proved September 27, 1950, as amended by section 213 of the Postal Rate Increase Act, 1958, approved May 27, 1958 (64 Stat. 1050, 72 Stat. 143, 31 U.S.C. 695), and section 207 of the Act of February 28, 1925, as amended (43 Stat. 1067, 45 Stat. 942, 39 U.S.C. 247), this Department requested the Interstate Commerce Commission to consent to the establishment of such rate increases and other reformatations necessary to insure (1) that the revenues from fourth-class mail service will not exceed by more than 4 per centum the costs thereof and (2) that the cost of such fourth-class mail service will not exceed by more than 4 per centum the revenues therefrom. Consent has been given by the Interstate Commerce Commission in its decision dated November 17, 1959, Docket No. 32158, to revise postal rates on parcels of fourth-class mail and on catalogs and similar printed advertising matter of the fourth class. Accordingly, paragraphs (a) and (b) of §25.1, Title 39, Code of Federal Regulations, are hereby amended to read as follows effective February 1, 1960: [At this point two tables containing the rates are set out in the order.]”

/s/ GEORGE BUNN
George Bunn

Subscribed and sworn to before me this 1st day of December, 1959.

.....
Notary Public, D. C.

(SEAL)

My commission expires:

EXHIBIT 1

Price Waterhouse & Co.,
Pittsburgh, November 18, 1953

Committee on Post Office and Civil Service,
United States Senate.

Dear Sirs:

As requested by Mr. H. W. Brawley, Director of Post Office Investigation, we made (1) a general review of the cost-ascertainment system of the Post Office Department, and (2) tests to obtain an indication of the approximate amounts of cost that would be assigned to the main classes of mail on the assumption that the basic purpose of the Post Office Department is to handle first-class mail and that all other classes should be charged only with the direct or incremental costs occasioned by them. The attached exhibit I has been prepared to show the results of these tests.

The cost-ascertainment system is the method used by the Post Office Department to (1) estimate the number of pieces, weight, and other statistical information regarding the various classes of mail handled, and (2) allocate, by statistical means, revenues, and expenditures over the various classes of mail and special services. Revenues are allocated to various classes of mail and services based on tests of the pieces and weight handled and distances transported. Expenditures are allocated over the various classes of mail and services based on tests of pieces handled, space occupied, weight, and other statistical measurements of cost, on the assumption that the post office is organized to handle all classes of mail and special services on a joint basis.

Since its inception as an annual undertaking in 1926, the cost-ascertainment system has been examined critically. The system is under constant scrutiny by the Post Office Department to improve the procedures or to refine alloca-

tions to meet changing conditions, and it has been reviewed by several independent experts who, in general, have agreed that it provides desirable statistical information.

Also, the cost-ascertainment system has been criticized by important mail users, postal representatives (including certain Postmasters General), and others, because of one or more of the following: (1) The allocations under this system do not give consideration to the belief that the post office is organized primarily to handle first-class mail, which condition governs the location and type of facilities acquired, the means of transportation used, and the type of delivery service; (2) although it is primarily a statistical method of allocating revenues and costs, attempts are made to use its results as a basis for fixing rates; (3) certain of the bases of the cost allocations are subject to debate; (4) the report for any fiscal year is not available until months after the close of the year; and (5) the tests appear to be more extensive, and the cost (approximately \$1,500,000 per annum) may be greater than necessary for the results it produces.

As evidence of the belief that the Post Office Department is organized primarily to handle first-class mail, former Postmaster General Walter F. Brown told the Congress in 1930:

From the beginning up to the present day the requirements of first-class mail have determined not only the means of transportation to be used but the frequency of service, whether by foot carrier, post rider, star route, railroad, motor vehicle, or aircraft. The requirements of first-class mail have determined the location of post offices and post-office stations and branches. First-class mail is given preferential treatment throughout the entire Postal Establishment. At every stage it is handled with maximum speed and security. All other mail matter must give way to mail of the first class and all other mail matter receives incidental and deferred treatment.

The criticism of the use of the cost-ascertainment report as a ratemaking instrument arises because ratemaking is highly specialized and is concerned with many matters other than those of an accounting or statistical nature, such as public welfare, priority of service, economic worth, ability to pay, preferential treatment, demand for service, and reasonable rates of return. Cost factors are important information but they should not be the sole consideration.

Regardless of the criticisms of the cost-ascertainment system, post office officials have informed us that they believe the system produces adequate analytical and statistical information for management purposes. They base their conclusions partly on their conviction that the Postal Establishment is organized to handle all classes of mail and special services jointly for the benefit of all the people, rather than being primarily an institution to handle first-class mail. They therefore, have no plans for discontinuing or revising the basic cost-ascertainment system.

Our review of the cost-ascertainment system consisted of (1) limited tests of the methods and procedures used, including a visit to a post office during a cost-analysis week, (2) review of reports of various independent experts who have investigated the system, and (3) discussions with post-office officials. The review revealed that all the tests of basic information, i.e., pieces, copies, weight, space, distance, etc., are made by local postal employees. Certain of the tests in larger post offices are checked by supervisors, but there does not appear to be extensive supervision of the tests nor independent check thereof.

In our opinion, assuming the fairness of the information revealed by the tests which, according to the information furnished us, are not extensively supervised nor independently checked, the cost-ascertainment system provides an acceptable allocation, on the bases indicated above, of revenues and expenditures over the various classes of mail and services.

Because of the contention the post office is organized primarily to handle first-class mail, and because cost factors are important in any consideration of rates, it may be helpful to those responsible for fixing rates to be informed of the costs allocated to the respective classes of mail and services determined by a method different from that used in the cost-ascertainment report.

The advisory council of the Senate Committee on Post Office and Civil Service, therefore, requested us to allocate the expenditures of the Post Office Department over the major classes of mail on the assumption that handling first-class mail is the basic purpose of the Post Office Department and that other classes of mail and special services should be charged with only the direct or incremental costs occasioned by them.

Such an allocation would require time-consuming detailed studies because the accounts of the Department are not maintained in such a manner that the direct or incremental costs of the respective classes of mail and services can be identified. To obtain an indication of the cost that may be assigned to the major classes of mail based on that assumption, we requested post-office officials to estimate what portion of 7 of the more important expense accounts, totaling \$1,823,800,000 for fiscal 1952, or 68 percent of all expenditures of the post office for that year, would be applicable to first-class mail. It was estimated that \$1,225,800,000 was applicable to first-class mail. The remainder (\$598 million) of the 7 expense accounts tested was then allocated to the other major classes of mail and services on various bases considered by the officials to be fair as a method of estimating the direct or incremental costs occasioned by such classes. After excluding \$187 million directly applicable to special services, and general administrative expenses totaling \$23,100,000, the other expenses (totaling \$645,900,000) were allocated over the major classes of mail in the same proportion as the \$1,823,800,000.

In the time at our disposal, this was the only practical method of making a distribution. It should be kept in mind, as stated above, that allocations on this basis are not intended to be absolute but only indicative of what the results may be if detailed studies were made.

It is apparent, however, that under this method a substantial amount of cost would be allocated to first-class mail that is now allocated to the other classes of mail and special services.

Exhibit I attached shows the expense accounts tested and the allocations of costs under this test, compared with the estimated cost determined under the cost-ascertainment system. To facilitate comparison of the estimated costs under the two methods, we have included in the exhibit certain basic statistics regarding the pieces, weight, and relative volume of the major classes of mail. Such statistics must be considered carefully to avoid erroneous conclusions. For example, the pieces of first-class mail, in general, require more handling than do the pieces of second-class or third-class mail because many of the large users of the latter classes perform their own sorting and bundling.

We trust the foregoing will provide the information desired and shall be pleased to discuss the matter in detail with members of the committee at their convenience.

Yours very truly,

PRICE WATERHOUSE & Co.

EXHIBIT 1

EXHIBIT I.—Indication of costs applicable to major classes of mail based on the assumption that handling 1st class mail is the basic purpose of the post office and that other classes of mail are charged with only the direct or incremental costs occasioned by them, based on fiscal year 1952 operations

	1st Class	2d Class	3d Class	4th Class	All Other Classes and Services	Total
Statistics (per cost ascertainment):						
Pieces and transactions	26,494,694,972	6,956,425,598	11,630,346,208	1,256,865,328	3,567,542,184	49,905,874,790
Pounds	701,684,973	2,412,658,430	711,546,134	7,114,619,675	631,760,222	11,572,269,434
Pound-miles, nonlocal mail						
(000 omitted)	250,009,737	1,164,499,433	422,395,163	4,151,576,045	447,417,940	6,435,898,318
Revenues (per cost ascertainment) ..	\$842,700,000	\$51,400,000	\$170,500,000	\$484,500,000	\$403,700,000	\$1,952,800,000
Incremental cost basis:						
Operating costs tested:						
Salaries and travel:						
Postmasters!	\$110,500,000	\$ 900,000	\$ 2,800,000	\$ 8,000,000	\$ 6,700,000	\$ 128,900,000
Assistant postmasters!	18,400,000	100,000	200,000	500,000	400,000	19,600,000
Clerks, 1st & 2d class offices! ..	599,600,000	24,500,000	44,000,000	60,700,000	107,900,000	836,700,000
City delivery carriers!	328,100,000	27,600,000	46,700,000	42,500,000	21,000,000	465,900,000
Railroad service!	155,600,000	25,600,000	13,800,000	155,200,000	8,600,000	358,800,000
Fuel & utility services!	8,800,000	—	—	200,000	—	9,000,000
Building supplies, equipment, and maintenance!	4,800,000	—	—	100,000	—	4,900,000
TOTAL	\$1,225,800,000	\$ 78,700,000	\$107,500,000	\$267,200,000	\$144,600,000	\$1,823,800,000
Costs applicable directly to "All other classes and services"	—	—	—	—	187,000,000	187,000,000
Other costs except those set forth below?	434,000,000	27,800,000	38,100,000	94,900,000	51,100,000	645,900,000
TOTAL	\$1,659,800,000	\$106,500,000	\$145,600,000	\$362,100,000	\$382,700,000	\$2,656,700,000

[See footnotes page 43]

EXHIBIT 1 (Continued)

Exhibit I.—Indication of costs applicable to major classes of mail based on the assumption that handling 1st class mail is the basic purpose of the post office and that other classes of mail are charged with only the direct or incremental costs occasioned by them, based on fiscal year 1952 operations

	1st Class	2d Class	3d Class	4th Class	All Other Classes and Services	Total
General administrative costs: ³						
General administration	22,600,000	—	—	—	—	22,600,000
Miscellaneous	500,000	—	—	—	—	500,000
TOTAL COSTS	\$1,682,900,000	\$106,500,000	\$145,600,000	\$362,100,000	\$382,700,000	\$2,679,800,000
Deficit or (profit)	\$ 840,200,000	\$ 55,100,000	\$ (24,900,000)	\$ (122,400,000)	\$ (21,000,000)	\$ 727,000,000
Cost-ascertainment basis:						
Costs:						
Postal operations	\$ 737,500,000	\$219,900,000	\$332,200,000	\$367,100,000	\$436,400,000	\$2,093,100,000
Transportation of mails	45,000,000	55,800,000	27,400,000	265,200,000	164,600,000	558,000,000
General administration & other costs	7,800,000	2,400,000	2,800,000	5,900,000	9,800,000	28,700,000
Deficit or (profit)	\$ 790,300,000	\$278,100,000	\$362,400,000	\$638,200,000	\$610,800,000	\$2,679,800,000
	\$ (52,400,000)	\$226,700,000	\$191,900,000	\$153,700,000	\$207,100,000	\$ 727,000,000

The above estimates give no effect to revenue or expense adjustments subsequent to fiscal year 1952.

¹ 1st class mail has been charged with the basic operating costs and only estimated direct or incremental costs have been allocated to other classes of mail.

² Other costs except general administrative have been apportioned in the same proportion as the 7 operating cost accounts tested.

³ General administrative costs have been charged to 1st class mail on the assumption that the basic purpose of the post office is to handle 1st class mail.

⁴ Excludes \$13,600,000 of free-in-county expense which is included in "All other classes and services."

EXHIBIT 2

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET No. 32158

INCREASED PARCEL POST RATES, 1957

STATEMENT OF THEODORE HERZ
PARTNER IN PRICE WATERHOUSE & CO.
APPEARING ON BEHALF OF THE
PARCEL POST ASSOCIATION, INC.

My name is Theodore Herz. I am a partner in Price Waterhouse & Co., professional public accountants, and am associated with my firm's Washington office.

I am a certified public accountant of the District of Columbia and I am a certified public accountant of the States of California, Illinois, Maryland, Michigan, Missouri and Washington. I have been a professional public accountant since 1930, except for a period in 1942 when I was the Controller of an enterprise in Kansas City, Missouri, and except for a period of slightly longer than two years from 1945 to 1947 when I was an official in the United States General Accounting Office in Washington, D. C. My work in the General Accounting Office, however, was substantially the same as that of a professional public accountant, the Government having concluded that it should reorganize its auditing to make it accord with professional practice.

My grade school and high school education were acquired in Chicago, the city of my birth, and I studied accounting at the University of Wisconsin where I received a B.A. Degree in Commerce in 1930.

I entered the professional practice of accounting in Chicago in the summer of 1930 in the employ of Arthur Andersen & Co. After nine years I was asked to move to Kansas

City, Missouri, where I was Assistant Manager of that firm's office until the spring of 1942. At that time I became the controller of Hall Bros., Inc. of Kansas City.

In the spring of 1943 I re-entered my profession, having accepted a position as an accounting manager in the Seattle office of Allen R. Smart & Co. My principal responsibility in Seattle was to audit the financial statements of Boeing Airplane Company and to attend to the other responsibilities which Allen R. Smart & Co. had assumed on behalf of that company.

I came to Washington in the fall of 1945 having accepted appointment as one of eight Assistant Directors in the then newly-created Corporation Audits Division of the United States General Accounting Office. My principal assignment, aside from participation in the development of policy and training for the Division, was to make an audit of the RFC and its subsidiaries for the period ended June 30, 1945. This audit resulted in the creation of the position of Controller which had not previously existed in the RFC, and it produced certain other major reorganization steps. It took about two years to complete the work on the report which is contained in ten volumes, eight having to do with the extensive and large-scale war-time activities of this group of Government corporations.

After completing the audit of the RFC I left the employ of the Government and became associated in Washington with my present firm, Price Waterhouse & Co. I was admitted to partnership in the firm on July 1, 1954.

During the year 1948 I was Staff Director for the first Hoover Commission's Task Force on Government Lending Agencies. This was the Commission on Organization of the Executive Branch of the Government, known as the Hoover Commission because its chairman was the former President of the United States, the Honorable Herbert Hoover. As Staff Director I was responsible for coordination and direction of the work of the Task Force and for the preparation of its report which was widely quoted in the years following its release.

When the second Hoover Commission was organized in 1953, I was asked to serve again as Staff Director of the Task Force concerned with the Government's Lending Agencies, and I did so. Again I was responsible for coordinating and directing the work of the Task Force and for preparing the report on the assignment.

From February 1950 until late in 1951, I worked as Staff Director for the Subcommittee on Reconstruction Finance Corporation of the Senate Committee on Banking and Currency. This was the Fulbright Subcommittee under the Chairmanship of the Honorable J. William Fulbright of Arkansas. As Staff Director I had the responsibility of supervising the work of auditors, investigators and other staff members, including a number of technical men made available by the General Accounting Office, and it was my function also to plan and organize the executive sessions and the public hearings of the Subcommittee and to prepare its reports. The work of this Subcommittee attracted extensive public notice for a period of some months, and many favorable comments were made on the quality of the work and the general character of the investigation.

Although it is best remembered for the episode involving the mink coat, the Fulbright Subcommittee did a great deal of serious research into the lending policies and the internal procedures of RFC and it made a number of sound legislative proposals, many of which, unfortunately, were not adopted.

In the years between 1951 and 1954 I undertook a number of less well-known projects for the Government as well as continuing in the practice of public accounting here in Washington. In 1949 I made a study of the cost accounting and reporting practices of the 12 Federal Reserve Banks, and assisted the Board of Governors of the Federal Reserve System in the complete revision of its manual governing these matters. More recently I have undertaken to represent my firm as auditor for the Board of Governors, and

in 1958 I directed a critical study of the Board's bank examination activities.

In 1951 my firm made a comprehensive study of cost accounting and budgeting in the Navy Department's Bureau of Ships. All costs of ship construction and conversion were studied, and our report on this assignment contained many recommendations for improvement in the procedures used. Although there was collaboration of a number of people on this assignment, I was responsible for much of the preparation of the report, and for a year after its issue I consulted with a special panel of officers in the Bureau which had been organized to work with the recommendations.

In 1952 I was asked to consult with the Internal Revenue Service for the purpose of assisting in the revision and modernization of the internal auditing practices of that agency. Later I was asked to consult with the General Accounting Office to assist the then newly-organized Audit Division in the perfection of its comprehensive approach to auditing.

In 1954 I participated with accountants from some of my firm's other offices in a study of the Post Office Cost Ascertainment System made on behalf of the Senate Committee on Post Office and Civil Service. The primary responsibility for this work was assigned to a partner in the firm's Pittsburgh office, but my participation was extensive both as regards the organization of the work and as regards the consultation which the Committee and its Advisors required during the work and after its completion.

In 1956 I was asked to, and did, participate in the work of an Advisory Committee created by the Senate Committee on Banking and Currency in connection with its consideration of the legislative proposals which, if enacted, would have been known as the Financial Institutions Act of 1957. This was an Advisory Committee of 27 persons. Twenty-four of them were bankers, and two were members

of the faculties of educational institutions. I was the only member to come from another profession.

In 1957 I was asked to and did consult with the Railway Express Agency in connection with its interest in the probable impact of certain legislative proposals concerning the parcel post. The advice required by the Railway Express Agency had to do with the procedures and methods employed in the Post Office Department Cost Ascertainment System.

I have been consulted also, from time to time, in matters of accounting and finance in State governments. In 1949 I participated in a survey of the organization and accounting practices of the government of the Commonwealth of Pennsylvania, undertaken on behalf of the Joint State Government Commission. My part of the survey had to do mainly with the Office of the Auditor General. Later, in 1955, I was asked to and did undertake the major responsibility for designing the complete overhaul and revision of the accounting system in the Department of Revenue in that State.

In 1955 I was asked to participate in a survey of organization and operation of the accounting, budgeting and auditing activities of the government of the State of California. This undertaking was primarily the responsibility of people from the California offices of my firm, but I was called upon to counsel with them because of the experience I had had in these fields.

For about three years now, I have been serving as a member of certain committees of the United States Chamber of Commerce which are concerned with the operations of Government departments and with the financial affairs of the Government. This work requires the making of studies in the field of budgeting, cost accounting and financial management generally, both in the Legislative Branch of the Government and in the Executive Branch.

At the present time I am a member of the Committee on National Defense of the American Institute of Certified Public Accountants. This group consults with representatives of the Bureau of the Budget, with representatives of the Department of Defense and with other officials of the Government on problems associated primarily with the financial and accounting aspects of procurement for defense purposes. Large-scale and complex cost accounting problems are encountered frequently in this work, particularly problems having to do with the allocation of joint costs among the several phases of a closely integrated activity.

At the present time I am a member of the Contract Finance Task Committee of the National Security Industrial Association. This group consults with officials of the Government primarily from the Defense Department and the military departments, and it concerns itself with the financial aspects of the contracting procedures. It concerns itself also with cost accounting and other accounting problems which arise in this connection; many of the most difficult contract cost problems are those involved in the assignment of joint costs among the several elements of complex industrial activities.

I have recently been asked to participate in the work of the Advisory Council on Federal Reports. This organization was created in 1952 to assist the then Director of the Bureau of the Budget in his newly-acquired responsibility for reviewing and approving the form of reports which business enterprise and others are required to make to the various departments and other divisions of the Federal Government. The Advisory Council has recently organized a special committee which will deal with financial reports required by the Department of Defense and my responsibilities are to be in this special area.

I have prepared technical articles from time to time for publication in *The Journal of Accountancy*, the official publication of the American Institute of Certified Public

Accountants, and in *The Controller*, the official publication of the Controllers Institute of America. Also I have spoken from time to time at accounting conferences sponsored by professional organizations and by educational institutions, and some of these presentations have subsequently been published.

I am a member of the American Institute of Certified Public Accountants and have been since 1942. I have membership also in the National Association of Accountants, the American Accounting Association and the Controllers Institute of America, the latter being the professional organization of the principal financial officers of enterprises.

I am also a member of the National Security Industrial Association, the United States Chamber of Commerce and the Academy of Political Sciences.

I have frequently been asked by other offices of my firm to consult with them on problems of governmental accounting or on problems of industrial accounting, including cost accounting, particularly where these have come up in connection with relationships between enterprises and the Government. I was recently asked, for example, to consult extensively with certain of our people who had undertaken to make a comprehensive study of the cost accounting practices of a large manufacturer in the aircraft industry. This was an extremely complicated study involving the assignment of joint costs among the various operations involved in the production of airplanes and engines, and it included many problems which have their counterpart in the cost ascertainment studies made annually by the Post Office Department.

I have been asked to appear as an expert witness in this proceeding to testify on the accounting implications of the Postal Policy Act of 1958.

Specifically, I have been asked to suggest a way in which the Post Office Department might be enabled to make the cost evaluations, or cost determinations, required by the

Postal Policy Act of 1958, and to suggest a way in which the Department might coordinate the making of such determinations with the statistical studies that comprise the annual cost ascertainment. It is my understanding from earlier testimony of others, that the Department has not developed a way of doing these things.

In making this presentation I will refer to a letter I prepared on this subject and delivered over the signature of my firm to Messrs. Arnold, Fortas & Porter on April 8, 1959. Copies of this letter were furnished to the Hearing Examiner by Messrs. Arnold, Fortas & Porter, and the letter is identified in this record as Parcel Post Association Exhibit —.

I have been asked to present in my testimony, also, some indication of the impact which a correct accounting interpretation of the Postal Policy Act of 1958 might have on the fourth-class-mail cost data and deficit data heretofore presented to the Interstate Commerce Commission in this proceeding.

The pending request for an increase in parcel post rates is based primarily on the results of the 1957 cost ascertainment in which it appears that a total of \$644,971,292 was assigned on a use-of-facilities basis as the amount of costs for the year attributable to the fourth-class-mail service. The monetary amount quoted here is taken from Exhibit I of the 1957 Cost Ascertainment Report where it is designated as that portion of "total adjusted budgetary expenditures" which is to be associated with "total fourth-class mail". The principal components of this figure, aggregating \$589,148,886 (for zone-rate parcels and catalogs), or the starting point for the calculations in Mr. Edmund J. Walsh's testimony which reported that a revenue deficiency of \$88,073,302 had been estimated.

In my firm's letter, to which I have referred, it is explained that the Cost Ascertainment System by itself does not make the cost evaluations and adjustments contemplated by the Postal Policy Act of 1958, and it is

explained further that if those allocations and adjustments were made, there would be a lesser amount of cost to be assigned among the classes of mail service under the conventions of the Cost Ascertainment System. In other words, there would be a lesser amount of cost to be allocated according to the proportions in which the several classes of service make use of the Department's facilities and activities.

If, in preparing the data which appear in the record of these proceedings, the Post Office Department had given full effect to the provisions of the Postal Policy Act of 1958 in substantially the manner outlined in my firm's letter, it would follow that the total amount attributable to the 1957 fourth-class-mail service would have been less than \$644,971,292. If the total of \$644,971,292 had been reduced to a lesser total in this way, then there would have been a corresponding reduction in the components of it which aggregated \$589,148,886 (zone-rate parcels and catalogs), and further, there would have been a reduction in the estimated revenue deficiency of \$88,073,302.

The amount by which the \$88,073,302 revenue deficiency would have been reduced is the impact which I have been asked to measure and to report to the Commission in my testimony. My firm's letter of April 8, 1959 makes it clear that the calculations necessary for this measurement require:

First, evaluation of the costs properly associated with the first-class-mail preference, and evaluation of the costs properly associated with the public services specified in the Postal Policy Act of 1958.

Second, deduction of these two totals from the total of all costs of the Post Office Department.

Third, allocation of the remaining costs of the Post Office Department among the various classes of mail and the auxiliary services on a use-of-facilities basis.

The evaluations required in the first of these three steps have not been made for the year 1957, and I have neither

the intimate knowledge of postal operations nor the access to data required for making them. Nor do I have the data for making the allocations on the use-of-facilities basis which are specified in the third of the three steps, even if the evaluations had been made and the other preliminary steps had been taken.

However, there are some data available which will indicate the order of magnitude of these evaluations, and there is a basis for making an approximation of how their elimination from the total of 1957 costs might affect the amounts allocated to the several classes of service, and specifically the fourth-class-mail service.

On August 16, 1957, Mr. Maurice H. Stans, then the Deputy Postmaster General of the United States, appeared and gave testimony before a Subcommittee of the Committee on Post Office and Civil Service of the United States Senate. My firm's letter of April 8, 1959 refers to this testimony, and specifically it refers to the presentation which appears on page 30 of the printed hearings. Referring to the work of a Committee on Cost Allocation which had been organized in the Post Office Department, Mr. Stans said, ". . . some classes of mail receive definite preference in handling and delivery, are of greater value and significance, and receive certain privileges. These are factors which cannot be effectively measured by cost-accounting procedures, and, for that reason, the cost-ascertainment system does not attempt to measure them. They are, nevertheless, proper factors to be taken into account in rate determination. For example, first-class mail received priority in handling over every other class of mail while in post offices and in transit. There are many operations of the postal service geared to first-class mail exclusively. The Post Office incurs many extra expenditures because of this treatment." Mr. Stans then listed a number of specific examples which were accompanied by an evaluation on a cost basis. These are quoted more fully in my firm's letter of April 8, 1959 and they

are summarized as follows, along with the evaluations given by Mr. Stans:

	Annual cost amount
Cost of night differential pay	\$35,000,000
Cost of second and third delivery trips to business offices	52,000,000
Cost of railway post office cars and highway post offices	86,000,000
Cost of vehicle service, star-route service and mail messenger service	31,000,000
	<u>204,000,000</u>

In addition to these items, Mr. Stans' testimony refers to the costs of "overtime [which] involves many millions of hours throughout the year", but his testimony does not present a specific evaluation of this factor. Nor does it present an evaluation of the other factors which enter into the first-class-mail preference, those listed being described only as "some specific examples".

In order to make an approximation of the portion of this \$204,000,000 total which might be deemed to have been attributed to the fourth-class-mail service by application of the Department's Cost Ascertainment System, I made reference to Table 90 which appears at page 100 of the Post Office Department's Cost Ascertainment Report for 1957. From this table it can be determined that for the fiscal year 1957, the fourth-class-mail service received an allocation of about 16% (15.708) of the Department's total postal operations costs, and it received an allocation of about 48% (48.453) of the Department's total transportation of mails costs. The first two amounts in the tabulation shown above would seem to be properly classified as postal operations costs, and the last two as transportation of mails costs. By applying the percentages in this way, it seems fair to say, as an approximation, that the 1957 cost ascertainment would have allocated \$14,000,000

out of the \$204,000,000 total to the fourth-class-mail service for night differential pay and for the cost of second and third delivery trips to business offices. And it seems fair to say that the 1957 cost ascertainment would have allocated approximately \$56,000,000 to the fourth-class-mail service for the cost of railway post office cars and for the cost of vehicle service, star route service and mail messenger service. Together, these would come to a total of \$70,000,000 allocated to the fourth-class-mail service in 1957 out of the amounts of these four specific examples of the cost of the first-class-mail preference.

Considering that the testimony which was given by Mr. Stans referred to data of the year ended June 30, 1956 (in which the general level of prices was below the level of the next later year), and considering that the items listed are "some specific examples" and not an exhaustive list of the things which make up the first-class-mail preference, one could fairly make the presumption that in the year 1957, something substantially more than \$70,000,000 of cost was allocated to the fourth-class-mail service because of omission to make the evaluations and the cost segregations specified in the Postal Policy Act of 1958, with particular reference to the preference accorded the first-class-mail service.

In addition to providing for the segregation of the costs of the first-class-mail preference, the Postal Policy Act of 1958 provides that certain "public service costs" also shall be segregated so as to eliminate them from among the items charged to the several classes of mail on a use basis. My firm's letter of April 8, 1959 discusses these public service costs on the pages numbered 11 through 16. On page 15 of that letter, it is explained that the Post Office Department has from time to time reported the accomplishment of certain cost-savings by the elimination of third-class post offices or fourth-class post offices. These savings have been calculated as being on the average about equal to \$1,400 for each post office eliminated. According

to the 1957 Cost Ascertainment Report, there were 27,197 third-class and fourth-class post offices in that year. If it would be fair to assume that an operating cost saving of \$1,400 could be accomplished by the closing of each one of these offices, then it could be calculated that the closing of all of them would produce a saving of \$38,076,000, this saving to recur annually.

This amount could be taken as an approximation of the public service costs of keeping the 27,197 third-class post offices and fourth-class post offices in existence and operating, and it could be said therefore that this is a fair evaluation of the public service costs to which the Postal Policy Act of 1958 refers under this heading.

If one were to apply the 16% allocation ratio mentioned above as being the one appropriate for the assignment of postal operations costs, then it could fairly be said that a portion of approximately \$6,000,000 out of this public service cost is assigned to the fourth-class-mail service by the conventions of the 1957 cost ascertainment.

The public service costs designated as "loss from operation of the star-route system" are more difficult for me to accommodate in my testimony. The total of star route service cost assigned to the fourth-class-mail service by the 1957 cost ascertainment was \$26,619,753. This total should not be taken as the measure of the public service costs under this heading within the meaning of the Postal Policy Act of 1958, at least in this presentation, because there is an element of star route service cost which has been included in the calculation of the cost of first-class-mail preference made in the preceding paragraphs on the basis of Mr. Stans' testimony of August 16, 1957. It would appear, therefore that in employing the basis I have used to make the approximation presented here, one must take for the public service costs associated with the star-route system, a figure less than \$26,619,753. In addition to the factor already mentioned, there is the further factor that it may be appropriate to offset against these

costs some specific revenues which may have been derived from the operation of the star route system; I understand that these are not extensive in any event. These things have not been measured in the data which I have been able to assemble, and I can only suggest to the Commission, first, that the total of \$26,619,753 must be taken into account, and, second, that there should be an appropriate discount so as not to overstate the amount deemed to be that by which the correct application of the Postal Policy Act of 1958 would reduce the 1957 cost associated with the fourth-class mail service. I have no basis for suggesting a figure, and therefore I have not used one.

To summarize my testimony, I present the following table. The figures represent the approximate amount by which correct application of the Postal Policy Act of 1958, in the manner described in my firm's letter of April 8, 1959, would reduce the total of the costs which by the conventions of the 1957 cost ascertainment are ascribed to the fourth-class-mail service.

On account of the first-class-mail preference	\$70,000,000
On account of the loss from operation of third - class post offices and fourth-class post offices	6,000,000
On account of loss from operation of the star route system	an undetermined amount
	<u>\$76,000,00</u>

It should be observed that this \$76,000,000 total is stated partly in terms of 1956 cost levels and partly in terms of the cost levels which characterize the 1957 cost ascertainment. In making the calculation of the \$88,000,000 revenue deficiency reported in his testimony, Mr. Walsh estimated that there would be subsequent cost increases, and in the data presented in his testimony, these were estimated at \$78,021,000. This amount was added to an adjusted 1957 cost total of \$528,065,411 and it appears therefore that the

Post Office Department anticipated about a 14% increase in the average of its costs. If the total of \$76,000,000 shown in the summary above were to be increased by 14%, in recognition of rising cost levels, then it could be said that the application of the Postal Policy Act of 1958 in the manner suggested in my firm's letter would bring about an \$86,000,000 reduction, or more, in the total of costs associated with the fourth-class-mail service as those costs have been reported in these proceedings.

In my testimony and in my firm's letter of April 8, 1959, I have dealt with the costs of the first-class-mail preference and with the public service costs designated as those involved in the loss from operation of the star route system and third-class and fourth-class post offices. The Postal Policy Act of 1958 specifies a number of other public services and provides that their costs shall be financed from the general revenues of the Government rather than through charges paid by users of the mails. It has been said that no part of the other public service costs is charged against the fourth-class-mail service by the normal application of the Cost Ascertainment System, and if this were so there would need to be no adjustment with reference to these other public service costs such as the adjustments described in my testimony.

The Cost Ascertainment System is a method of allocating all costs of the Post Office Department among the classes of service exclusively on the basis of use of facilities. This being so, it is difficult to see how one could be assured that any class of mail service escapes a charge for some part of each category of the public service costs when charges are determined under the conventions of the Cost Ascertainment System. I know of no way of providing such assurance with respect to either the public service costs dealt with in my testimony or those omitted, other than the method which is outlined in my firm's letter of April 8, 1959. Until a determination has been made employing the basis described in that letter, or its substantial equivalent, it cannot be said with assurance that

the fourth-class mail costs for the year 1957, as determined by the Cost Ascertainment System, do not include some element of each public service cost specified in the Postal Policy Act of 1958.

To the extent that they do, the \$86,000,000 adjustment described in my testimony would be greater.

EXHIBIT 3

PRICE WATERHOUSE & CO.
1000 VERMONT AVENUE, N. W.
WASHINGTON 5, D. C.

April 8, 1959

Arnold, Fortas & Porter
1229 19th Street, N. W.
Washington 6, D. C.

Dear Sirs:

On March 16, 1959 you wrote to Honorable Burton Fuller, Hearing Examiner, Interstate Commerce Commission, concerning certain aspects of the proceeding before that Commission which relates to a proposed increase in parcel post rates (Docket No. 32158). In that communication you advised Mr. Fuller that you had asked us to devise a reasonable method of ascribing monetary amounts to the conceptions "cost or loss relating to the first-class mail preference and to third- and fourth-class post offices and star routes."

To us it seems clear from a study of the Postal Policy Act of 1958 that in the opinion of the Congress there are three principal components which make up the cost of operating the postal establishment. One of these is a body of costs which it is fair to charge against the users of the mails through rates reflecting the relative use of postal facilities by the several classes of service. The second is a body of costs which are incurred because it is public policy to provide preferential service for first-class mail;

the Act says these should be recovered by the Government through rates charged to the users of the first-class-mail service. The third is a body of costs which are incurred because it is public policy to provide a full postal service to persons who are located in remote, inaccessible or sparsely-populated places or to persons who should be granted a preference because they are burdened with handicaps like blindness or for other special reasons; the Act says these costs are to be borne by the general taxpaying public. From the standpoint of Congressional policy the three components of cost described in this paragraph are to be considered as separate from one another and capable of being distinguished from one another in the financial statistics of the Post Office Department.

Persons familiar with postal operations understand that these three cost components exist, because acknowledgment of their existence reflects a correct appreciation of the manner in which the postal establishment is conceived, organized and operated. Among students of the Post Office Department and of its operations and financial affairs, it also is generally understood that these three cost components are closely intermingled in the accounts, and in many if not most instances, they are not separable from one another by the application of the ordinary conventions of recordkeeping and cost accounting. This is a matter of necessity and nothing can be done to make it otherwise.

From this it follows that there should be general recognition of the fact that the financing specified in the Postal Policy Act of 1958 requires the making of judgment estimates based on reviews, studies and surveys of the postal establishment and of its expenses and revenues. The language of the Act seems clearly to imply that the Congress expects the determinations called for to be fair and responsive approximations which reflect an understanding of the Congressional policy and which employ the best information obtainable by practical means. So far as tech-

niques are concerned, this would be essentially the same type of allocation work as is done by the Department annually in its Cost Ascertainment System.

Assignment of responsibility for defraying costs:

The Postal Policy Act of 1958 expresses it as the policy of Congress that the "fair value" of the first-class-mail preference should be recovered in the rates for postage on first-class mail (Section 103(c)(2)). It is our opinion, based on the context in which this policy expression appears, that the words "fair value" mean fair value on a cost basis and not on a basis which either augments cost by the addition of a premium or reduces it by the deduction of a discount.

We may summarize as follows our reason for concluding that the words "fair value" can only mean fair value on a cost basis.

Under the law it is required for determination of the rate base, that an amount representing the fair value of the service preference be added to the amount representing costs allocated to the first-class-mail service on a use basis. Together these make the rate-base for first-class mail.

This fair value addition, if it were to represent something other than the cost of providing the preference, would necessarily represent one or another or a combination of three other factors. It could represent the burdening of first-class mail rates with some of the costs incurred in providing service to users of other classes. But it obviously is not intended to represent this, since the Congress has clearly expressed it as its policy that there should be no such transfer of costs from one class to another. (Section 102(5)) The second other factor which the fair value addition could represent is a charge for the purpose of recovering from first-class mail users the amount of allowances granted to users of other classes through discounted rates. Here again, the expressed policy of the Congress interferes; it is policy that no class of

users should be charged for special rate considerations granted to other classes and consequently the addition cannot be intended to represent this kind of an increment. (Section 102(5)) The third other possibility is that the fair value addition could represent a profit margin. This also cannot be what is intended, for, according to the Act, "while the postal establishment . . . should be operated in an efficient manner, it clearly is not a business enterprise conducted for profit . . ." (Section 102(5)).

Since there are no other elements of increment over the cost of a particular class of service than these three, it follows that the fair value addition does not represent an increment over cost. It must therefore represent another element of cost. As regards this point, the Act clearly implies that there are at least two components in the total cost of operating the postal establishment, the one to be apportioned among classes of service on a use basis, the other to be associated exclusively with the first-class-mail service. (There is a third component, the public service costs, discussed elsewhere in this letter.)

It is our opinion, from an accounting standpoint, that Section 102(5) of the Postal Policy Act of 1958 can have no other correct interpretation than that the words "fair value" are the equivalent of the words "fair value on a cost basis."

In contrast to the policy of the Congress that first-class-mail users should pay the cost of their service preference, there is a different policy for covering the "losses" resulting from the operation of such prime and necessary public services as the star route system and the third-class and fourth-class post offices. These, on the other hand, "should be assumed directly by the Federal Government and paid directly out of the general fund of the Treasury and should not constitute direct charges in the form of rates and fees upon any users of such public services, or of the mails generally" (Section 103(c)(3)(A)). The law specifies other public service charges which also are to be assumed directly by the Federal Government.

These conclusions concerning preferential service and public services are rate-making policy determinations. Though concerned with costs, they are not cost-ascertainment policy determinations. They have to do with identifying who it is that must stand the costs of operating the postal establishment, and not with determining how much the costs may total for any class of service. They deal with what former Deputy Postmaster General Stans has designated as "other factors which are pertinent under ratemaking principles." He was testifying at the time about the limitations of the Post Office Cost Ascertainment System when considered from the standpoint of rate-making.

The Cost Ascertainment System does not produce the data required:

The Post Office Cost Ascertainment System does not provide a basis for ascribing a fair value (fair cost value) to the first-class-mail preference. Nor does it provide a basis for determining what portion of the total costs of the Post Office Department shall be "deemed to be attributable to the performance of public services under Section 104(b)" of the Postal Policy Act of 1958.

As it has functioned traditionally, and as it functions at present, the Post Office Cost Ascertainment System is a method of associating costs with the several classes of service exclusively on a use basis, and for this purpose, neither the public services nor the first-class-mail preference are deemed to be classes of service. The Post Office Cost Ascertainment System allocates all of the costs (and the revenues) of the Post Office Department among first-class, second-class, third-class and fourth-class mail service and auxiliary services on the basis of a system of ratios deemed to reflect only the relative use which the several classes of service make of the Department's facilities and activities.

This limitation in the Cost Ascertainment System is sometimes overlooked in discussions of postal costs and rates, particularly when they are considered in their relationship to the 1958 policy enactments. It has been asserted at times (specifically, for example, see the letter of Mr. Herbert B. Warburton, General Counsel, addressed on March 24, 1959 to Honorable Burton Fuller, Hearing Examiner, Interstate Commerce Commission) that "the cost of first-class mail service, including the cost of extraordinary facilities and preferential services accorded to such mail, has been included in the Department's ascertainment of the cost of first-class mail. Consequently, the cost of fourth-class mail . . . does not include costs representing 'extraordinary and preferential services and facilities accorded to first-class mail.' "

The inaccuracy in this assertion may be attributable to an erroneous conception of the meaning of either the Postal Policy Act of 1958 or the Department's Cost Ascertainment System or perhaps even both. On the other hand, it may result from a lack of clear distinction as to whether it is cost-ascertainment or postal rate-making that is the subject of discussion; the two are frequently discussed together and with imperfect distinction.

As explained in a preceding paragraph, the Cost Ascertainment System allocates all costs of operating the postal establishment among the several classes of service only according to proportions which represent the extent to which each class makes use of the facilities of the establishment. It must be clear from this that unless the cost of the first-class-mail preference is first eliminated from the total to be subjected to such allocation, then the allocation certainly assigns some part of the costs of the preference to each class of service, fourth-class-mail service included.

It would be impossible in the present structure of the Cost Ascertainment System to ascribe the cost of the preference to only the first-class-mail service. The only way

to correct this would be to modify the system so that the costs of the preference are first ascertained by themselves and eliminated from the total which is to be allocated on a use basis.

It is not our intention, by incorporating this observation in this letter, to rebut the assertions which may have been made on this subject from time to time. However, it seems important that there be a clear understanding of (a) what the Postal Policy Act of 1958 requires and (b) what the Cost Ascertainment System produces. This is required so that the necessary steps of reconciliation may be clearly understood by the Post Office Department and correctly devised. We hope by this comment to help to clarify these points.

*Specification of a method for producing
the data required:*

Under the Postal Policy Act of 1958, it is provided that "it would be an unfair burden upon any particular user or class of users of the mails to compel them to bear the expenses incurred by reason of special rate considerations granted or facilities provided to other users of the mails ..." (Section 102(5)). In order to adhere to this general policy pronouncement, and in order to give full effect to the other requirements of the Postal Policy Act of 1958, in our opinion, the following steps must be taken in each fiscal year, and with respect to the Post Office Department cost aggregates of each fiscal year, and they should be taken in the order in which they are listed here:

1. Make an evaluation of the costs properly associated with the first-class-mail preference, and make an evaluation of the costs properly associated with the public services specified in the Act.
2. Deduct the total of these two cost evaluations from the total of all costs of the Post Office Department.
3. Allocate the remainder of the costs of the Post Office Department among the various classes of mail and

auxiliary services on a use basis (by applying procedures and methods such as those which are used in the present Post Office Cost Ascertainment System).

These things should be done in advance of each fiscal year as a part of the budgeting process, using forecasts based on estimates. They should be done again after the conclusion of each fiscal year as a part of the accounting process using the data provided by the accounting records and auxiliary data of the Post Office Department. When they have been done after the conclusion of any year as a part of the accounting or cost-ascertainment process, or in related studies, the following determinations can be made:

1. When the cost value of the first-class-mail preference has been added to the total of first-class-mail costs determined on a use basis, the sum can be compared with revenues deemed to be those produced by first-class mail to see if the rates have been adequate over-all.
2. The costs allocated on a use basis among the other classes of mail and auxiliary services can be compared with the revenues deemed to be those produced by these other classes of service to see if in each case the rates have been adequate over-all.
3. The costs associated with the public services specified in the Postal Policy Act of 1958 can be compared with the amount (or amounts) in the Post Office Department appropriation which are designated for this purpose by the Congress to see if the amounts so designated, and the underlying budget estimates, have been adequate.
4. Appropriate recommendations can then be made for rate adjustments if any are required.

This, in our opinion, would conform to what is contemplated in the Postal Policy Act of 1958. We consider the doing of it to be both possible and practical.

Making evaluations of the first-class-mail preference:

The process of evaluating the first-class-mail preference is primarily a matter of making the reviews, studies and surveys deemed necessary as the basis for informed judgment estimates or approximations. The first step in doing this is to list, and as carefully as possible to specify, the things which constitute the preference. This should be done by persons who have a long-standing familiarity with the operating policies and practices of the Department, with the facilities which comprise its physical plant, and with such abstract conceptions as "ways of doing" the Department's work.

In a hearing before a subcommittee of the Senate Post Office and Civil Service Committee, 85th Congress, Mr. Stans, then Deputy Postmaster General, described some of the costs which are incurred because of the requirement that first-class mail receive preferred service, and he said "It is only fair to relieve the other classes of mail of such costs and to charge them wholly to first-class mail for ratemaking purposes".

The following items which were described by Mr. Stans are examples of the costs which should be ascribed to the first-class-mail preference, and they are examples also of the things which constitute the preference (he was discussing first-class, second-class and third-class-mail service and did not in these quotations refer to fourth-class-mail service, though the comments are equally appropriate to the fourth-class-mail service):

1. "Postal employees work in the evening, receiving a 10-percent night-differential pay. There is only one primary reason for working employees in the evening, and that is to move first-class mail. If it were not necessary to expedite first-class mail, post offices could be operated on an 8-hour day, following the practice of industry. Employees working the night shift give their first attention to first-class mail, but once that has been handled, they also work second- and third-class matter.

[Mr. Stans should also have said fourth-class matter.] Under costing procedures, this results in a portion of the night-shift differential being charged against second- and third-class services. [Mr. Stans should also have said fourth-class service.] But, if it were not for the fact that night shifts are necessary to handle first-class mail, there would be no necessity of expending an additional \$35 million annually, the amount of night-differential pay involved.

2. In business areas of cities, mail is both collected and delivered. Second and third delivery trips are also extended to business offices every day. The only purpose of the second and third delivery trips is to expedite delivery of first-class letters, but letter carriers also take along second- and third-class mail [Mr. Stans should also have said fourth-class mail] that is ready for distribution. In the cost-ascertainment system, the cost of these delivery trips is allocated on the basis of the classes of mail handled. However, the second and third delivery trips would not be necessary at all if it were not for the need of expediting letter mail. The Post Office Department spends approximately \$52 million annually to provide collection service and second and third delivery trips. This expense could be avoided almost entirely if it were not for first-class matter.
3. The Post Office Department has railway post office cars and highway post offices to distribute mail en route. These services cost approximately \$86 million a year. These transportation units are set up solely for the purpose of expediting the delivery of first-class mail. However, some part of the cost of these services is allocated to second- and third-class mail [Mr. Stans should also have said fourth-class mail], because this type of matter is handled to fill in the available space and provide the postal employees with a full workload.
4. Overtime involves many millions of hours throughout the year, a large portion of it during Christmastime. If it were not for the fact that first-class mail had to be expedited, there would

be no need for spending the additional money needed for overtime labor. In the cost-ascertainment system, a portion of these overtime costs is allocated to second- and third-class mail [Mr. Stans should also have said fourth-class mail], because such matter is handled to keep the employees fully occupied. But from a ratemaking viewpoint, these costs are really (sic) incurred to give preferential treatment to first-class matter.

5. The Department's vehicle service, star-route service, and mail-messenger service are all set up to provide frequency of delivery, at extra cost, in order to get first-class mail delivered more often than would be necessary if the Department handled only second- and third-class matter. [Mr. Stans should also have said fourth-class matter.] Yet these services handle all types of mail, and costs are apportioned to each mail class. The cost of these delivery services is approximately \$31 million a year."

So much for the first step. The second step in evaluating the first-class-mail preference is to make studies and devise tests which will produce ratios or other guides and measures for the evaluation (on a cost basis) of each preferential activity, facility or other element. Essentially, this is the same sort of thing as has been done over the years in the development and application of the Cost Ascertainment System, and it involves essentially the same kind of reviews, studies, surveys, judgments, measurements, calculations, interpolations and extrapolations.

The third step is to apply the ratios or other guides calculated from the tests, and to add the resulting evaluations into a total evaluation.

Making evaluations of the public service costs—star routes:

The problem of evaluating the various public services, including those specified as loss from operation of the star route system and third-class and fourth-class post offices,

is essentially the same kind of a problem as the one described in the preceding paragraphs. There is in this case, however, the added requirement that some of the public services should be given credit for the revenues which should properly be ascribed to them, if any.

The first step in making a cost evaluation of the public service represented by star routes is to list, and to specify as carefully as possible, the things which constitute the public service. In the case of the star route system this should not involve complications, the system being fairly well defined within the structure of the postal establishment. The succeeding steps, as in the case of the first-class-mail preference, are to make reviews, studies and surveys in order to devise tests which will produce ratios and other guides and measures for evaluation of each component element of the service, and then to perform the tests, apply the ratios and accumulate the resulting individual evaluations into a total evaluation.

In the case of star routes, in our opinion, there should be no revenue allocation in determining the loss (public service cost) from the function, unless perhaps there may be occasional incidental revenue collections which are peculiarly associated with the use of the star route system and not with the use of any class of postal service in its entirety.

As we understand the star route system, it is a transportation service maintained primarily for post offices which are not served by other means of mail transportation. Also, it provides supplemental service for post offices which are not otherwise afforded an adequate mail transportation service. Some star routes, we understand, are maintained exclusively for the purpose of providing postal delivery and collection service, and a fair number of those which exist to supply the post offices also provide some postal delivery and collection service. Essentially, however, the star route system is one of a number of means by which the postal establishment transports the mails from one inter-

mediate point in the system to another, and it therefore is not a service offered to users but only an adjunct to such a service.

In making an accounting for costs or losses designated as being attributable to the existence and operation of the star routes, one would no more associate revenues with the costs than one would associate revenues with the costs of such other service adjuncts, for example, as overtime pay or as the operation of motor vehicles or as any number of other cost fragments which simply represent one way, among others, of performing the various component functions which in their aggregate make up the operation of the postal service.

Just preceding the section of the Postal Policy Act of 1958 which specifies the various public services and in which the expression "loss from operation of the star route system" is used, there is a paragraph which to us seems to indicate clearly how the Congress intended that the word "losses" should be construed in this connection. The paragraph referred to constitutes item (4) of Section 103(c) of the Act. It reads in full as follows:

- "(4) Postal rates and fees shall be adjusted from time to time as may be required to produce the amount of revenue approximately equal to the total cost of operating the postal establishment less the amount deemed to be attributable to the performance of public services under section 104(b) of this title."

The expression "loss from operation of the star route system", then, means that portion of the total cost of operating the postal establishment which is represented by "the amount deemed to be attributable to" the operation of the star route system. This, in our opinion, means the cost amount deemed to be attributable, and the clear inference is that there should be a deduction for revenues only if any are peculiarly attributable to patrons' use of the star route system by itself.

*Making evaluations of the public service costs—
third-class and fourth-class post offices:*

From the standpoint of ideal treatment, evaluation of the public service costs incurred through the operation of third-class post offices and fourth-class post offices would require that there be a modification of the cost ascertainment system, incorporating in it the making of certain supplemental determinations. The cost ascertainment system as it has been and is in use in the Post Office Department classifies all costs and all revenues only according to the classes of service. The supplemental determinations which would seem to be called for in an ideal response to the Postal Policy Act of 1958 would serve to classify the costs and the revenues according to operating units as well (though perhaps in summary form and not necessarily in detail by individual units).

The relationship between the results of only the present approach and the results of the supplemental determinations could be said to be analogous to a statistician's cross-classification table. In such a table the present type of cost ascertainment can be visualized as a vertical arrangement of the data, there being a line in the table for each class of service. The data produced by the supplemental determinations can be visualized as a horizontal arrangement, there being a column for each operating unit of the system (or for classes of units taken together in summary).

In a set of such tables one would find in columns for each third-class post office and for each fourth-class post office (or for groups of offices taken together), the full amount of all Post Office Department costs deemed applicable to the services performed through that office. These, of course, would include a share in all costs of handling and transportation no matter where they were incurred in the system, and their aggregate, of course, would be reduced by a share in all revenues of the system regardless of

where the postage may have been sold to users.* Line for line in each column, the items would be segregated by class of service and, within classes, by type of expense. All allocations would have been made to units or groups of units in accordance with a set of formulae, ratios and other factors based on reviews, studies, surveys and tests designed to show what relative portion of each service could fairly be said to have been performed through the medium of the particular post offices under consideration.

If the Department were to incorporate the supplemental determinations in its cost ascertainment system and to summarize the data in the manner described, then it would be a simple matter to read off the public service costs associated with third-class and fourth-class post offices, reduced by the appropriate amounts of revenue. In total these would make up the amount which should be eliminated, on this account, from the total of all costs of the Post Office Department in order to arrive at the residue which under the Postal Policy Act of 1958 is deemed to be appropriately chargeable to the users of the mails on a use basis.

It is probable that the Congress did not intend for the Post Office Department to incur the full cost and expend the full effort of associating all costs and all revenues in complete detail with all individual operating units of the postal establishment. However, from a study of the Postal Policy Act of 1958, it seems clear that the evaluation required to meet the need described in the Act is an evaluation which, at practical cost and with a practical expenditure of time and effort, produces a result approximating as nearly as possible the result which would be produced if the supplemented cost ascertainment were actually employed in full detail.

* The testimony of the Post Office Department refers to the necessity for making such a revenue allocation, but it omits to explain that handling and transportation costs should also be ascribed to operating units in the manner mentioned here.

The thing which it is necessary for the Post Office Department to do, to fulfill the need described by the Congress, is to gather the best data available to it so that, at practical cost and in a practical span of time, it can make the evaluation best calculated to produce the substantial equivalent of the result described.

From time to time, the Department has reported that certain cost savings could be accomplished, or were accomplished, by elimination of a third-class post office or a fourth-class post office from the system. Such savings figures are computed, first, by adding together all of those cost charges, like postmasters' salaries and rent, which are eliminated by and because of elimination of the office. The total so obtained is reduced, as a second step in the calculation, by deducting from it the total of all new costs which must be incurred to provide the replacement service made necessary by the elimination of the office. The amount saved in this way is a saving out of the total of the public service costs here under consideration, and all of the amounts which enter into its calculation represent elements which also would enter into an evaluation like the one required under the Act.

If a hypothetical calculation of this type were to be made for each third-class post office and each fourth-class post office and each substantially similar center of activity, then certainly the resulting data would be a part of the public service cost which the Act seeks to segregate. The making of such calculations could be the starting point for producing the evaluation described in these paragraphs, namely, the evaluation which seeks to approximate as nearly as possible the one which would result if the supplemental determinations were fully incorporated in the cost ascertainment system.

In our opinion, the Post Office Department could reasonably start with a body of calculations like those described in the preceding paragraphs. Then, in our opinion, the Post Office Department could prepare a list and, as pre-

cisely as possible a description, of the rest of the elements which would constitute the public service provided by the existence of third-class post offices and fourth-class post offices. Having listed and described the components of the public service, the Department could develop ratios and other factors for evaluating each separate element and in this way they could bring the evaluation to completion.

In our opinion, a procedure such as the one described is possible and practical and if it were approached with (a) the firm belief that it can be done and (b) the willingness to do it, we believe it would meet the requirements of the Postal Policy Act of 1958.

We have attempted in this letter to maintain a full awareness of the problems confronting the Post Office Department and the Interstate Commerce Commission. We have tried also to be as responsive to your request as we can. If further explanations are required please feel free to call on us.

Yours very truly,

PRICE WATERHOUSE & Co.

Date of Service Nov. 20, 1959

EXHIBIT 4

INTERSTATE COMMERCE COMMISSION

No. 32158

INCREASED PARCEL POST RATES, 1957

Decided November 17, 1959.

Upon investigation, consent given to the establishment of increased postal rates on parcel post and catalogs. Appropriate order entered.

Herbert B. Warburton, Leo G. Knoll, Paul Meininger, and Morris J. Levin for the Postmaster General.

F. H. Floyd, S. Harrison Kahn, and W. H. Waldrop, Jr., for interveners.

William J. Bird, Charles B. Bowling, S. N. Bradley, George Bunn, John S. Burchmore, Robert N. Burchmore, Frank M. Cushman, K. Norman Diamond, David L. Dickson, Roy C. Frank, James M. George, Dow W. Harter, Thomas C. Hope, S. F. Kirby, J. Austin Latimer, Dickson R. Loos, McKinley M. Luther, Arthur J. Maurer, Leonard Mongeon, Joseph C. Nelson, Paul A. Porter, P. H. Porter, Russell Rulon, and Charles A. Washer for protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the examiner's proposed report, and the issues were orally argued. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

This proceeding was instituted by our order of May 20, 1957, in response to a preliminary request, filed by the Postmaster General on April 18, 1957, for our consent to the establishment of increased rates on fourth-class mail (parcel post and catalogs), pursuant to the requirements of 31 U. S. C. 695 and 39 U. S. C. 247.

On November 28, 1958, the Postmaster General filed an amended request for our consent to the establishment of specific rate increases to comply with the following provisions of 31 U. S. C. 695, as amended by section 213 of Title II of Public Law 85-426, approved May 27, 1958:

Hereafter none of the funds appropriated to the Post Office Department from the general fund of the Treasury shall be withdrawn from the Treasury until the Postmaster General shall certify in writing that he has requested the consent of the Interstate Commerce Commission to the establishment of such rate increases or other reformatations (in addition to any specific increases or other reformatations heretofore or hereafter authorized by law), pursuant to the provisions of section 247 of Title 39, as may be necessary to insure (1) that the revenues from fourth-class mail service will not exceed by more than 4 per centum the costs thereof and (2) that the costs of such fourth-class mail will not exceed by more than 4 per centum the revenues therefrom.

The rate increases proposed range from 35 percent down to 1 percent, and average 17.1 percent, the percentage of increase diminishing within each zone, other than local, as the weight of the parcel increases, with a few reductions for the greater weights and longer distances.

There were 13 days of hearings, a pre-hearing conference, and conferences between cost consultants of the parties and the Commission; visits to post offices in Baltimore, Md., Philadelphia, Pa., and New York, N. Y.; the presentation by 31 separate witnesses¹ of written and oral state-

¹ Including witnesses for the following protestants: National Industrial Traffic League, Parcel Post Association, National Council on Business Mail,

ments and a substantial number of exhibits; 1600 pages of transcript; and numerous preliminary pleadings. On December 12, 1958, the protestants filed a petition to dismiss the application as violative of the Postal Policy Act of 1958, hereinafter referred to. Action on this petition was deferred pending hearing.

The present and proposed rates for representative weights and zones for parcel post and catalogs, and the costs for such movements as determined by the Department, are set forth in appendix A to this report.

The proposals are based on traffic which moved in the fiscal year 1957, which was used as a test period for statistical purposes in this proceeding. Based on 1957, the proposed rates would result in an increase of approximately \$88 million annually, as shown by the following table reflecting the cost findings of the Department:

	Parcel post	Catalogs	Total
Expense	\$588,712,000	\$17,374,000	\$606,086,000
Revenue	503,953,000	14,060,000	518,013,000
Deficit	84,759,000	3,314,000	88,073,000
Additional Revenues Anticipated	86,366,000	2,402,000	88,768,000
Excess or deficit	1,607,000	— 912,000	695,000
Cost coverage (percent)	100.3	94.8	100.1
Anticipated revenue	\$590,319,000	\$16,462,000	\$606,781,000
Increase in revenue (percent)	17.1	17.1	17.1

The operations of the Post Office Department are unique in that they consist of the handling of written and printed matter as well as packages. Its revenues are derived chiefly from the sale of stamps, and its expenses are

Inc., Jewel Tea Company, Greater Boston Chamber of Commerce, Steelco Stainless Steel, Inc., Cosmestic Laboratories, Inc., Chilton Greetings Company, Commercial Enterprises, Inc., Henry Field Seed and Nursery Company, Sperry and Hutchinson Company, W. T. Grant Company, Allied Stores Corporation, Eagle Pencil Company, Popular Merchandise Company, Inc., Avon Products, Inc., Whaling Distributing Corporation, Sears, Roebuck and Company, Montgomery Ward & Company, Inc., National Bellas Hess, Inc., National Association of Direct Selling Companies, Esterbrook Pen Company, Conard Pyle Company, Gurney Seed & Nursery Company, Spiegel, Inc., and Lilly Mills Company.

largely joint. The allocations of its revenues and expenses among the several classes of mail and services are determined by tests or samplings at selected times, places, and facilities, under the so-called cost ascertainment system. For the fiscal year 1957, the test periods were four periods of seven consecutive days each, namely, September 17 to 23, 1956, November 26 to December 2, 1956, February 4 to 10, 1957, and May 13 to 19, 1957, with an adjustment, among others, to reflect the heavy mailing weeks preceding Christmas. Tests were conducted by and under the supervision of qualified and experienced personnel at 448 post offices, comprising 1.19 percent of the total in number, and 45.17 percent in revenue, including all of the offices, 19 in number, with an annual revenue of over \$15,000,000, and on 16.6 percent of the railway post office lines, 13.2 percent of the annual mileage, 8 percent of the highway post offices, 21.1 percent of the terminal and transportation offices, and 10.2 percent of the truck routes.

From these tests ratios were developed for the apportionment of the total revenue and expenses among the several classes and services, the apportionment of the latter being on appropriate bases, such as piece, time, square feet, weight, cubic feet, and cubic-foot miles.

The costs as thus determined were adjusted upward to allow for major increases in costs incurred subsequent to the end of fiscal year 1957, including increases in railway mail pay prescribed in 1957 and 1958, increases in salaries and related personnel costs established by Congress in 1958 in Public Laws 85-426 and 85-462, and contributions to the civil service retirement fund. The revenues and expenses as thus developed for parcel post and catalogs were segregated to zones and weights by customary methods of computation.

The Department also submitted revenue, expense, and deficit data for the fiscal year 1958, which were computed for catalogs and parcel post on a basis comparable to the data covering the fiscal year 1957, as adjusted. These showed the total deficit thereon to be \$100.8 million, or

\$12.7 million more than that shown for fiscal 1957, and demonstrate the present trend of cost increases.

During 1932-1953, the average allocated cost per unit of fourth-class mail under the cost ascertainment system increased at a greater rate than those of the other three classes, and the average of the four classes combined. After 1953, the unit cost of fourth-class mail remained substantially constant, while the unit costs of the other classes increased, except for second-class mail which was about the same in 1957 as in 1953. Nevertheless, comparing 1948 with 1957, on a piece basis, the average cost of fourth class increased 68 percent, as compared with 39 percent for first class, 47 percent for second class, 37 percent for third class, and 46 percent for the four classes combined. If the cost per piece for fourth class had increased at the same rate as the average, the total cost of the fourth-class mail for fiscal year 1957 would have been \$83 million less than that shown by the Department.

Using the piece or other unit basis as indicated for the major expenditure accounts, the following table shows the percentage increase per unit during this period for fourth class, the average for the four classes combined, and how much less the total under each account would have been for fourth class (more in the case of vehicle service and rural delivery), if its percentage increase in cost per unit had been the same as the average:

Account	Unit	Percent increase in allocated costs per unit		Amount ¹ (millions)
		Fourth class	All classes Average	
Compensation to postmasters	Piece	49	39	\$ 0.5
Supervisors and clerks in 1st and 2nd class PO's ..	Piece	87	58	21.2
City delivery carriers	Piece	110	44	22.8
Rural delivery	Piece	8.5	14	0.5 ²
Operating force for public buildings	Cu. ft.	80	35	5.3
Rents	Cu. ft.	168	90	4.0
Rail transportation and mail messenger service	Cu. ft. mile	10	7	7.6
Railway mail service	Piece	51	20	9.2
Star route service	Cu. ft. mile	49	32	2.5
Vehicle service	Cu. ft.	38	59	5.7 ²
Short-haul truck service ..	Cu. ft.	275	274	0.2
Other expenditures	Piece	165	98	14.6
Total				\$81.7

¹ Amounts that would be added to or deducted from fourth-class allocated costs if its percentage increase per unit had been the same as the average for all classes.

² Deducted.

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The protestants argue that the above showing indicates an overcharge to fourth-class mail in fiscal year 1957 by the above amount. It could of course be argued with equal force that it indicates an undercharge to fourth-class mail in fiscal year 1948. The fact is that it indicates neither, but is primarily due to the lesser increase in the volume of fourth-class mail, and the circumstance that unit costs of parcel post and other bulk mail are naturally less responsive to volume and efficiency changes than are letters and other flat mail.

Other changes which affect this matter, some of which began or were given primary emphasis after 1953, are the following:

1. The customer cooperation program, encompassing (a) premailing separation of local and nonlocal letter mail, (b) delivery zone number system, (c) improved addressing, (d) mailing early in the day, (e) required pre-sorting of bulk third-class mail, and (f) maintenance of punched card mailing lists, particularly by large publishers.

2. Changes in the composition of the mail.

3. Discontinuance of the second city delivery in residential areas, which resulted in a relative reduction in the cost of first, second, and third class mail which constitute the major part of the workload of city-delivery foot carriers, but had relatively slight effect on parcel post costs, since the service on parcel post routes was substantially unchanged.

4. Discontinuance of directory service, which was largely in connection with first-class mail.

5. Simplification of procedures for accepting second-class mail, and computing and accounting for postage and treatment of undeliverable second class mail.

6. Loose pack procedures in dispatching letters and flat mails.

7. Reduction and changes in railway post office service, which is predominantly related to classes of mail other than fourth class.

8. Improved letter-sorting equipment in post offices, permitting tie-outs of more direct packages and reduced handlings.

9. Expansion of physical facilities to relieve congestion in post offices and terminals dictated by the requirements of bulky types of mail.

There have also been improvements in the procedures for handling fourth-class mail during this period, which have offset to some degree the influence of its lesser increase in volume and the 9 items listed above.

During 1948-1957, the volume, in pieces, of first, second, third, and fourth-class mail increased by 44, 9, 92, and 4 percent, respectively, the share of the total costs allocated to first and third class increasing by 1 and 5 percent, respectively, and to second and fourth class decreasing by 3 percent each. During the same period the total costs

allocated to fourth-class mail increased by 74 percent, as compared with an overall increase in costs allocated to the four major mail classes of 96.1 percent; and from 1953 to 1957 the costs allocated to fourth-class mail increased only 2.9 percent, as compared with an average increase for the four major mail classes of 20 percent. For most of the major expenditure accounts, the total costs allocated to fourth-class mail increased at a lower rate than those allocated to the other classes, the absolute figures for certain of the accounts being actually less in 1957 than in 1953.

One of protestants' cost consultants presented a study which alleged an inequitable assignment of approximately \$56 million in costs to parcel post by the cost ascertainment system (CAS), based upon an attempted comparison of the Department's work performance standards (WPS) with CAS.

Protestants' presentation used actual performance records developed by WPS, related these to assumptions of the operations performed on each class of mail, and thereby computed the average number of manhours required in certain described operations in facing and sorting mail. It then estimated the costs of these operations by using \$2 as the average hourly rate of employees engaged in facing and sorting operations. By using the total number of pieces of mail handled by the Department in 1957, as reported by CAS, as a basis for projecting to annual totals, and multiplying "these volumes by the number of manhours required to face and sort one piece of mail and by the hourly rate of clerical employees," protestants obtained what was assumed to be "an estimate of the total costs" for these operations. These estimated costs were then compared with the costs of mail handling and window service (found in CAS), and it was concluded that the "costs apportioned to fourth-class mail in the 1957 CAS report exceeded those estimated on the basis of WPS data by approximately \$56 million."

This conclusion was checked by the protestants by using national standards of WPS developed by the Department, which, while admittedly optimistic, were considered by them as guides for apportioning costs among the four classes of mail. Calculations based on the standards allegedly indicated an overcharge of \$50-60 million to fourth-class mail for the mail-handling and window-service expenditures.

The Department attacked the protestants' study on two bases: (1) That WPS and CAS are not comparable, and (2) that in the attempt to correlate the two systems, a number of highly-significant mistakes were made, including the use of obviously-erroneous assumptions, all of which led to invalid conclusions.

Concerning the first point, the Department's operations expert stated:

At first we had some hopes that this (WPS) would not only give us a measurement of the performance of our employees with reference to whether or not they were throwing a sufficient number of letters per minute or parcels per minute and so on, in any given time, but also we had at that time hoped that it might be of some value to us in determining our costs with reference to classes.

The Department further explained its position as follows:

WPS data do not reflect differences between offices in facilities, equipment and layout and other factors which tend to create differences in performance in addition to personal efficiency of supervisors and employees. The data produced are intended to serve to compare actual productivity of personnel with theoretical productivity and are interpreted by management within the framework outlined above.

No comparisons have been made by the Department of actual expenditures at WPS offices with theoretical amounts based on production standards and if such comparisons were made they would be misleading.

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It is impossible to conceive how these data, which are developed for internal management use to measure and improve operating efficiency and to control personnel costs in mail handling operations, could have any relevancy to the reasonableness of the Department's CAS results showing the costs of handling parcel post and catalogs.

The Department indicated that, whereas CAS makes its calculations based upon the four classes of mail, WPS does not break down the four classes.

Six major errors were found by the Department in protestants' study on WPS. The first deals with the basic premise that "the only work areas encompassed by the program are facing and sorting of the mails." WPS actually encompasses all mailhandling activities of the mailing division at installations where the program is in effect. This error, based upon a misconception of the operations of WPS, affected every calculation which followed therefrom.

Second, the study, although purporting to list "the average number of manhours required to process 1,000 pieces of mail in the nine principal work centers", did not include hours for all operations required to process the different types of mail. The study actually used only the manhours required for direct distribution operations, which generally do not represent manhours of direct-service labor or indirect-service labor operations. The mail-handling operations omitted do not bear a uniform relationship to distribution operations for the different types of mail.

Third, protestants' testimony implied that the average cost factors used as the basis for the calculations were based on data for all offices operated under WPS procedures. The data actually used to calculate the averages were from a varying number of offices, and those handling parcels were poorly represented.

Fourth, the study used averages which were not related to the types of mail to which they were applied. The

classification of mail by types in the WPS offices is not uniform, but depends on the method of operation and the operating structure of the individual mailhandling installations and the flow and handling methods used at different offices or on different tours at the same installation.

Fifth, the assumptions made as to the average number of sorting operations required to process the four classes of mail have no factual support, and are inaccurate. The general effect was to overstate the costs for first, second, and third class mail by failing to consider that substantial quantities of these three classes, and particularly second and third-class mail, are able to bypass the primary and secondary outgoing sorts because of the method of preparation for the mails. Likewise, the assumption of 100 percent primary sort incoming for second and third-class mail failed to consider that substantial quantities are segregated to delivery zones by the senders, and generally do not require a primary sort.

Sixth, the average rate of pay of \$2 per hour used in the study is incorrect. The average rate of pay per productive hour for clerks and mail-handlers for 1957 was \$2.41.

The results of WPS procedures have not proven satisfactory to the Department, and they have recently been superseded by improved procedures known as equated pieces of mail, (EPOM).²

After considering the evidence submitted by both parties, we find that CAS, which is based upon actual costs allo-

² A system devised for converting the pieces of various types of mail into a common work unit called EPOM's. This is accomplished by multiplying them (pieces) by a weighting factor which is a ratio of the manhours required to process a piece of that type of mail to the manhours required to process a machine canceled letter. Under this system, work-load data for outgoing and incoming mail is compiled uniformly for all post offices with receipts of over 200,000 annually. When perfected this will permit comparisons of unit costs of individual post offices and will provide a yardstick for estimating total work-load and manhours requirements for each region. Manhour budgeting under this system and the further development of work-load factors will make possible the justification and substantiation of various programs on a cost basis.

cated to specific classes of mail, and WPS, which dealt with statistics for general types of mail, are not sufficiently comparable to provide a means of testing the reasonableness of the cost ascertainment data.

The Postal Policy Act of 1958, Title I of Public Law 85 426, approved May 27, 1958, reads, in part, as follows:

Sec. 102. The Congress hereby finds that—

* * *

(5) While the postal establishment, as all other Government agencies, should be operated in an efficient manner, it clearly is not a business enterprise conducted for profit or for raising general funds, and it would be an unfair burden upon any particular user or class of users of the mails to compel them to bear the expenses incurred by reason of special rate considerations granted or facilities provided to other users of the mails.

* * *

Sec. 103. (a) The Congress hereby emphasizes, reaffirms, and restates its function under the Constitution of the United States of forming postal policy.

(b) It is hereby declared to be the policy of the Congress, as set forth in this title—

(1) that the post office is a public service;

(2) to provide a more stable basis for the postal-rate structure through the establishment of general principles, standards, and related requirements with respect to the determination and allocation of postal expenses;

* * *

(c) (1) In the determination and adjustment of the postal-rate structure, due consideration should be given to—

(A) the preservation of the inherent advantages of the postal service in the promotion of social, cultural, intellectual, and commercial intercourse among the people of the United States;

(B) the development and maintenance of a postal service adapted to the present needs, and adaptable to the future needs, of the people of the United States;

(C) the promotion of adequate, economical, and efficient postal service at reasonable and equitable rates and fees;

(D) the effect of postal services and the impact of postal rates and fees on users of the mails;

(E) the requirements of the postal establishment with respect to the manner and form of preparation and presentation of mailings by the users of the various classes of mail service;

(F) the value of mail;

(G) the value of time of delivery of mail; and

(H) the quality and character of the service rendered in terms of priority, secrecy, security, speed of transmission, use of facilities and manpower, and other pertinent service factors.

(2) The acceptance, transportation, and delivery of first-class mail constitutes a preferred service of the postal establishment and, therefore, the postage for first-class mail should be sufficient to cover (A) the entire amount of the expenses allocated to first-class mail in accordance with this title and (B) an additional amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto.

(3) Those services, elements of service, and facilities rendered and provided by the postal establishment in accordance with law, including services having public service aspects, which, in whole or in part, are held and considered by the Congress from time to time to be public services for the purposes of this title shall be administered on the following basis:

(A) the sum of such public service items as determined by the Congress should be assumed directly by the Federal Government and paid directly out of the general fund of the Treasury and should not constitute direct charges in the form of rates and fees upon any user or class of users of such public services, or of the mails generally; and

(B) nothing contained in any provision of this title should be construed as indicating any intention on the part of the Congress (i) that such public services, of any of them, should be limited or restricted or (ii) to derogate in any way from the need and desirability thereof in the public interest.

(4) Postal rates and fees shall be adjusted from time to time as may be required to produce the amount of revenue approximately equal to the total cost of operating the postal establishment less the amount deemed to be attributable to the performance of public services under section 104(b) of this title.

Sec. 104. (a) The following shall be considered to be public services for the purposes of this title—

* * *

(2) the loss resulting from the operation of such prime and necessary public services as the star route system and third- and fourth-class post offices;

* * *

Sec. 106. The provisions of this title shall not require any downward adjustment in rates of postage on fourth-class mail existing on the date of enactment of this Act.

The extent of the preferential service given first-class mail is usually taken for granted without proper appreciation of either its value or its cost. Generally, in the postal services of the world, the handling of sealed first-class letters is the prime service. This is particularly true in the United States postal service, which handles more than 25 billion first-class letters annually. First-class mail, as a matter of right, is given preference handling from the moment of its deposit to the time of its delivery. It is sealed against inspection by anyone except the sender and the recipient. Fourth-class mail may be opened for inspection. Hundreds of thousands of collection boxes in convenient locations in cities and towns all over the United States are provided almost exclusively for the deposit of first-class mail. Fourth-class mail must generally be taken to a post office for mailing. The collection

of mail from these various depositories on closely-scheduled trips and at critical hours of the day represents one of the primary privileges accorded first-class mail. First-class mail is always handled first in post offices according to transportation schedules which will speed it to delivery. This handling accorded such mail is obviously costly, but it is essential to the preferential treatment to which this mail is entitled and receives.

The Department has reported to the Congress that about \$204 million allocated to all classes, including second and third class, in its cost ascertainment system for 1956 for night-differential and overtime pay, second and third deliveries in business areas, railway and highway post-offices, vehicle, star-route, and mail-messenger services, would not have been incurred had it not been for the preference given to first-class mail, and has recommended that, in fixing rates for the first three classes, the sum of \$316.3 million, which includes a part of this amount plus additional sums to reflect value of service and other intangible factors, be added to the allocated costs of first class and deducted from those of second and third class, resulting in a recommended postage rate of 5 cents per ounce for first class. This is based on a Departmental formula which had proposed that postage rates be sufficient to cover 50 and 75 percent of the allocated costs for second and third class, respectively.

Protestants contend that under the provisions of the Postal Policy Act, fourth-class mail is entitled to similar treatment. They contend that the following costs allocated to fourth class are occasioned by the preference given to first-class mail and should be transferred from fourth to first class accordingly:

Night differential and overtime pay.....	\$13,000,000
Second and third deliveries in business areas...	1,000,000
Vehicle, star route, and mail messenger service..	24,000,000
Railway and highway post office service.....	18,000,000
Total.....	\$56,000,000

The situation with respect to fourth-class mail is somewhat different. It is handled, particularly in the larger post offices, entirely separate from the first-class mail, and the night work performed thereon is due to the necessity of keeping it moving and not at all to the requirements of the first-class mail. Only a few packages are carried in the second and third deliveries in business areas, resulting in about 2 percent of this account being allocated to fourth class, but this is offset by the fact that a few letters and other flat pieces are carried in the parcel post delivery routes and allocation made accordingly. As to vehicle, star route, and mail messenger service, the amount suggested to be transferred is based on a percentage of the principal account, \$31 million, namely, 60 percent, which is a greater percentage of this amount than was allocated to fourth class in the first instance.

With respect to the railway and highway post office service, assuming that, if it were not for the requirements of the first-class mail, the fourth-class mail could have been served by the less expensive storage and truck service, the portion of the \$24 million to be transferred from fourth-class to first-class for this reason would not be substantial. It would be represented principally by the amount of the line-haul distribution expense apportioned to fourth class. None of the service rendered fourth-class mail under the first three items listed above could have been rendered at any less expense regardless of the service accorded first-class mail.

Protestants stress the fact that the "loss resulting from the operation of the star route system and third and fourth class post offices" is defined as a public service by section 104 (a)(2) of the Postal Policy Act, and contend that to the extent that the Department has included any portion of such loss in its costs allocated to parcel post and catalogs, such costs are overstated. At the hearing they estimated the annual loss from the operation of third and fourth class post offices, based on 27,197 such offices at

\$1,400 each,³ to be \$38,076,000, the portion of this loss alleged to have been erroneously allocated to fourth class being 16 percent thereof or about \$6,000,000. The protestants could not make a similar computation with respect to the loss from the star route system, but they state that it must have been substantial.

Obviously, losses can only be determined by comparing total revenues with total expenses. The operations of the star route system and third- and fourth-class post offices are integral parts of the line-haul and collection and delivery service of the Department, unless and until reduced or modified by proper authority. There is very little revenue directly associated with such operations. Total revenues, and hence total losses, cannot appropriately be ascribed to such operations any more than to any other integral part of the postal service. Although there is some conflict in the legislative history with respect to these matters, we believe that the allocation of the costs of these operations to fourth-class mail to the extent that they are used thereby is in conformity with the Act.

One of the protestants' consultants, in a report to Congress, made the following statement:

Since its inception as an annual undertaking in 1926, the cost-ascertainment system has been examined critically. The system is under constant scrutiny by the Post Office Department to improve the procedures or to refine allocations to meet changing conditions, and it has been reviewed by several independent experts who, in general, have agreed that it provides desirable statistical information.

Some of the experts have suggested that the system might be improved by the greater use of random or scientific, rather than selected, samplings and tests.

The Comptroller General of the United States, in his report to the Congress, dated March 4, 1958, made a specific

³ The average cost savings estimated by the Department for each such post office eliminated.

criticism of the system for the fiscal year 1955, with respect to the use by the Department of the cubic-foot-mile basis to allocate the major expenses incurred in the transportation of mail by rail and star route carriers to the several classes of mail. However, he also stated that there were some off-setting factors and other allocation methods used in the system which would tend to undercharge certain costs to fourth-class mail and that as a consequence he was unable to determine the net effect of a refinement of all allocation methods which affect this class of mail.

The only specific criticism by protestants of the allocations to fourth-class mail for fiscal 1957 was that by the cost consultant of protestant National Industrial Traffic League, as follows:

The Cost Ascertainment System results in charges to the fourth class of \$12,284,413 or 16.625 percent of the total railway post office costs, although only a small portion (2.182 percent) of the clerical time is devoted to fourth-class.

However, the Department's railway post office service includes many operations other than the distribution service, a much greater proportion of which is devoted to fourth-class mail. These include non-distribution, terminal, transfer, travel, employee benefits, and indirect expenses.

A consultant to another protestant found that—

In our opinion, assuming the fairness of the information revealed by the tests which, according to the information furnished us, are not extensively supervised nor independently checked, the cost-ascertainment system provides an acceptable allocation, on the bases indicated above (e.g., use of facilities and personnel), of revenues and expenditures over the various classes of mail and services.

The Committee on Post Office and Civil Service of the House of Representatives reported that—

In periodic and exhaustive scrutiny and analysis by professional accounting and statistical organizations

through the years the application of the basic cost ascertainment concepts and techniques have been sustained and the substantial accuracy of the figures established.

The Bureau of the Budget has reported that the cost ascertainment procedures "represent an adequate and appropriate method for the determination of the operating results by classes of mail and services."

Although this Commission has not heretofore specifically approved or disapproved the methods used by the system, it has in past parcel post cases relied on the results produced therefrom. It must be remembered that the system is not maintained simply as a special cost study of the parcel post for presentation in applications before us, but is a continuing study of all of the Department's costs, for its managerial purposes, and as a basis for its recommendations to the Congress.

Since the base year, fiscal 1952, used in the last parcel post case, *Increased Parcel Post Rates, 1953*, 289 I. C. C. 107, and based on the operations of that year, the Department has incurred a total annual increase in expenses of \$689.5 million. This includes two increases in salaries and related costs of approximately 10 percent each, authorized by the Congress. It also includes increases in railway pay authorized by us, of 10 percent to all railroads in *Railway Mail Pay*, 292 I. C. C. 101 (1954), 7.5 and 7 percent to the western and southern railroads, respectively, in *Railway Mail Pay, Applications of Southern and Western Railroads*, 302 I. C. C. 609 (1957), and 30 percent to the eastern railroads in *Railway Mail Pay, Application of Eastern Railroads, 1956*, 304 I. C. C. 135 (1958). Of this \$689.5 million, \$124.2 million is ascribed to parcel post and catalogs under the cost ascertainment system, as contrasted with the deficit of \$88.1 million shown above. The difference of \$36.1 million is ascribed by the Department to increases in efficiency, and this may be regarded as a saving. A further increase of 5.6 percent was authorized for the

western railroads in *Increased Mail Pay, Western Railroads, 1959*, 306 I. C. C. 719.

Under all the circumstances presented by this record, the results of the cost ascertainment system for the year 1957, adjusted as indicated above, while susceptible to improvement in the respects listed below, may be accepted as substantially accurate for the purpose of this proceeding.

Cost finding is a dynamic, not a static, art. Just as the Department's WPS has been improved by the substitution of EPOM's, so the Department's cost ascertainment system can and should be improved in the future in at least four particulars:

(1) The result of the EPOM's should be converted into dollars and integrated with the cost ascertainment system so the results of one can be checked with the results of the other.

(2) As the Department is in essence a governmental as well as a non-profit business enterprise, a clear distinction should be made between its budgetary expenditures and net accrued costs.

(3) Scientific or random sampling should be substituted for a series of samplings selected on the basis of the judgment of the Department's employees, no matter how capable the latter may be.

(4) Greater use should be made of direct cost accounting, particularly with respect to parcel post and catalogs, thus requiring allocation of joint costs only.

A majority of the protestants' witnesses submitted predictions of diversion under the proposed rates. They asserted that such rates would cause severe diversion from fourth-class mail to competing media of transportation, by their own companies and other companies similarly situated, thereby producing a substantial loss in anticipated revenues and resulting in the inability of the department to reach its revenue objective within the permissible variation of 4 percent.

Witnesses for Sears, Roebuck and Company, (Sears) and Montgomery Ward & Company, (Ward) presented statements and exhibits which, in the main, consisted of historical data demonstrating that their companies were moving away from the use of fourth-class mail in the conduct of their businesses. Both witnesses agreed that fourth-class mail should meet its costs under the statutory mandate. The avowed purpose of their testimony was to show that the proposed increases would cause such diversion that the Department could not reach a break-even level.

Sears' experience has shown that during the first year or first two years immediately following each fourth-class mail rate increase since 1948, its volume of parcel-post shipments from its mail-order plants to its mail-order customers has declined. Following the increase of 1949, such shipments declined by about 7,000,000 during the first year; following the 1951 increase, outbound shipments declined by about 6,000,000 in the first two years; and after the 1953 increase, outbound shipments declined by about 7,000,000 in the first year. The decline of such shipments since 1954 has ranged from 600,000 to 1,500,000 per annum.

Both Sears and Ward explained that a considerable part of their past diversion was due to changes in their *modi operandi*, the suburban growth, and changes in the size and weight limits, and that even if present rates were continued, further diversion could be expected. The witness for Sears graphically demonstrated that revenues received from Sears for parcel post had diminished each year since 1954, while rates remained static, and that this trend could be expected to continue in the future, notwithstanding rate changes.

Representatives of smaller companies similarly entered appearances to predict their use of other media in place of parcel post, and in a few instances, to complain of hardship upon their companies. Six members of the Parcel Post Association (PPA) submitted testimony antici-

pating diversion, as did three members of the National Retail Dry Goods Association. Protestants' counsel explained that these two associations did not necessarily speak for all of their members, and that it was possible that some of the members of these organizations might favor the Postmaster General's rate proposals. The testimony and exhibits presented by these companies, which extensively use or formerly used parcel post, described past diversion, and, while attributing this to increases in rates, certain of the witnesses admitted that other factors affected their use of parcel post, such as the great suburban growth, activities of their own competitors, changes in size and weight limits, and the advent of new types of service. Other witnesses admitted, in substance, the impact of the same factors by agreeing that their use of parcel post declined in years when rates remained static. Based upon their past experience, these companies contend that an increase would provide an economic impetus leading to greater diversion in the future. Studies were submitted showing the possibility of savings in transportation media with those charged by parcel post. Some companies stated that they could make further diversions under present rates at considerable savings.

Certain witnesses mentioned diversion of the more "profitable" traffic, indicating in some instances traffic to the farther zones, the loss of which was represented as more detrimental to the Department. It appears that some of the protestant companies were engaged in "drop shipping", that is, trucking the parcels part way and then entering them into the mail stream for delivery to the near zones.

In general, the protestants concede a need for the parcel post and certain service advantages not available in competitive media of transportation, such as the dependability of the postal establishment and the fact that it offers a "universal service" compared to the relatively limited service of competitors. As one of counsel for protestants

stated: "The U. S. parcel post system is the only satisfactory medium of small parcel service, through which every part of this great Nation can be reached."

Two parties supported the Department's proposals on parcel post. The Railway Express Agency (REA) presented testimony supporting the Postmaster General's proposal to increase rates on parcel post and catalogs, and the Whaling Distributing Corporation (Whaling), although opposing the proposal on catalog rates, similarly supported the parcel post rate proposal.

Express is competitive with parcel post, although 98 percent of the pieces of parcel post are presently charged rates below the \$2.01 minimum charged by REA. The number of express offices, as well as offices having pick-up or delivery services, and therefore the number of areas served by express, is diminishing, while parcel post is a universal service, serving every point. A witness for REA urged that certain expenses, not included in postal appropriations, should be included as costs of fourth-class mail. He nevertheless regarded the present reformatations as a proper step under the law. We considered a similar contention as to costs not covered by postal appropriations in the last two parcel post proceedings. We find no reason to depart from the prior conclusion that our function does not include consideration of this matter.

The witness for Whaling contended that proposed catalog rates for the more distant zones would not pay the cost of the service. He conceded that catalog mailers would benefit from the proposed rates for the farther zones, indicating that the "standard procedure" employed by catalog mailers was to mail to nearby zones, and that mailings are rarely made to the more distant zones. It should be observed that the Department's proposals reflect relatively greater revenue contributions over unit costs for the distant zones than for the near zones, even though the percentage increases are lower (and in some instances decreases) for the distant zones, particularly for the higher

weights. The evidence presented by Whaling does not establish that the proposed schedule of catalog rates is unreasonable in the light of ascertained costs for the respective zones and weights.

The proposed schedules represent a carefully considered effort to submit reasonable rate proposals designed to produce sufficient revenues to recover the cost of this service while avoiding inequitable variations in cost coverage and disproportionate increases in rates in the various categories of rates and distances. Generally, the same considerations were applied in the development of the catalog rate structure as in developing the parcel-post rate structure.

While it is recognized that some adjustments in volume may be anticipated in certain categories, it is the judgment of the Postmaster General and his expert witnesses that the rate proposals will result in a recovery of cost within the statutory requirements. This judgment is confirmed by the Department's past experience in fourth-class mail rate reformations and is entitled to great weight. Despite predictions of large volume losses and a resulting diminution of revenues made by protestants in the 1953 proceeding, the Department achieved the cost coverage anticipated and conducted the fourth-class mail service on a self-supporting basis until 1957.

Section 247 of Title 39 provides:

The classification of articles mailable as well as the weight limit, the rates of postage, zone or zones and other conditions of mailability under this section, if the Postmaster General shall find on experience that they or any of them are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater than the receipts of the revenue therefrom, he is hereby directed, subject to the consent of the Interstate Commerce Commission after investigation, to re-form from time to time such classifications, weight limit, rates, zone or zones or conditions, or either, in order to promote the service to the public or to insure the receipt of revenue from such service adequate to pay the cost thereof.

Protestants urge that the Department could recover all the costs which it has allocated to parcel post and catalogs if the Postmaster General would exercise his power under the above provision to reinstate the size and weight limits on fourth-class mail which existed prior to the enactment of Public Law 99, 39 U.S.C. 240(a). They argue that the Postmaster General has a statutory duty to exercise this power, and that we should withhold consent to further rate increases until the Postmaster General has reformed size and weight limits. The examiner excluded evidence offered by protestants on this subject. Protestants took exception to this ruling and made an offer of proof at the conclusion of the hearing. The examiner's ruling is sustained. *Increased Parcel Post Rates, 1953, supra*, at page 112.

ULTIMATE FINDINGS

We find that—

I. The revenues and costs allocated to fourth-class mail as determined by the Department's cost ascertainment system for the fiscal year 1957, as adjusted, are substantially accurate for the purpose of this proceeding, in that:

(A) They were allocated on appropriate bases by the use of samplings and tests at representative times and places, conducted by and under the supervision of qualified and experienced personnel.

(B) Such allocated costs cannot be said to be overstated by comparison—

(1) With the costs allocated to fourth-class mail under the system during prior years.

(2) With the Department's so-called work performance standards.

(C) That such allocated costs do not include any substantial proportion of the costs which should be allocated, within the meaning of the Postal Policy Act of 1958—

- (1) To the preferred service accorded first-class mail.
- (2) To the public services designated in said Act.

II. The rates proposed by the Postmaster General on fourth-class mail (parcel post and catalogs) are necessary and reasonably adapted to insure the receipt of revenues from such service adequate to pay the cost thereof, within the limits set forth in section 247 of Title 39 and section 695 of Title 31, as amended.

III. The proposed rates, within such statutory limits, will promote the development and maintenance of fourth-class mail service adapted to the present needs and adaptable to the future needs of the people of the United States and will promote adequate, economical, and efficient fourth-class postal service at reasonable and equitable rates.

IV. The proposed rates will be in conformity with section 247 of Title 39 and section 695 of Title 31, as amended, and the Postal Policy Act of 1958.

Upon consideration of all the facts disclosed by this investigation, we consent to the zone rates on parcel post and catalogs proposed by the Postmaster General. Protestants' petition to dismiss the application is denied. An appropriate order will be entered.

COMMISSIONER ARPAIA concurs in the result.

COMMISSIONER GOFF did not participate.

APPENDIX A
PRESENT AND PROPOSED RATES

Docket No. 32158
Appendix A, sheet 1

PARCEL POST												
Pounds	Local delivery rates				Zone 1 and 2 rates				Zone 3 rates			
	Present		Proposed		Present		Proposed		Present		Proposed	
	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents
2	20	24	25.27	33	27	33	33.62	29	35	35.89	31	39
3	21	26	27.78	31	31	38	38.54	34	41	42.0	38	47
4	23	28	30.22	43	35	43	43.32	39	47	47.93	45	55
5	24	30	32.60	48	39	48	47.98	44	53	53.71	52	63
6	26	32	34.93	53	43	53	52.53	49	59	59.34	59	70
10	32	40	43.83	73	59	73	69.85	70	83	80.71	87	98
20	46	60	67.05	113	99	113	115.20	121	138	136.81	156	168
30	61	80	89.16	153	138	153	158.24	173	188	189.89	225	238
50	90	120	131.44	233	217	233	240.20	276	288	290.63	363	378
70	119	160	171.74	313	296	313	318.01	379	388	385.96	501	498
												493.55

Pounds	Zone 5 rates				Zone 6 rates				Zone 7 rates				Zone 8 rates			
	Present		Proposed		Present		Proposed		Present		Proposed		Present		Proposed	
	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents
2	36	45	44.82	51	40	51	50.57	46	53	57.42	61	64	61	64	63.50	83
3	45	55	55.67	64	52	64	64.46	61	74	74.93	69	74	69	74	84.27	102
4	54	65	66.16	77	64	77	77.89	76	90	91.86	87	102	87	102	104.34	121
5	63	75	76.35	90	76	90	90.92	91	106	108.27	105	121	105	121	123.79	140
6	73	85	86.26	103	88	103	103.58	106	122	124.21	123	140	123	140	142.68	195
10	110	125	123.62	155	136	155	151.21	167	186	184.07	195	216	195	216	213.66	296
20	202	225	222.26	275	256	275	277.21	319	341	342.64	375	396	375	396	401.67	576
30	295	315	314.97	395	375	395	395.42	471	491	491.18	556	576	556	576	577.74	908
50	480	495	489.66	614	614	615	617.73	775	771	769.91	917	908	917	908	908.38	1278
70	665	655	653.63	853	853	835	825.61	1079	1031	1023.29	1278	1226	1278	1226	1217.81	

POD Exh. 1, Table 8

CATALOGS

Pounds	Local delivery rates			Zones 1 and 2 rates			Zone 3 rates			Zone 4 rates		
	Present		Proposed	Present		Proposed	Present		Proposed	Present		Proposed
	Cents	Cents	Costs	Cents	Cents	Costs	Cents	Cents	Costs	Cents	Cents	Costs
1.5	13	14	16.61	14.5	16	21.05	16	18	21.64	17.5	20	22.59
2	13.5	16	17.30	16	20	22.36	18	22	23.18	20	24	24.49
3	15	18	18.68	19	24	24.98	22	26	26.27	25	28	28.30
4	16.5	20	20.07	22	27	27.60	26	29	29.36	30	32	32.11
5	18	21	21.45	25	29	30.22	30	32	32.45	35	36	35.91
7.5	22	25	24.91	32.5	35	36.77	40	40	40.17	47.5	46	45.43
10	25.5	28	28.37	40	41	43.32	50	47	47.90	60	55	54.95

Pounds	Zone 5 rates			Zone 6 rates			Zone 7 rates			Zone 8 rates		
	Present		Proposed	Present		Proposed	Present		Proposed	Present		Proposed
	Cents	Cents	Costs	Cents	Cents	Costs	Cents	Cents	Costs	Cents	Cents	Costs
1.5	20.5	22	24.07	22	24	25.74	24	26	27.61	26	28	28.90
2	23.5	26	26.49	26	29	28.74	29	32	31.29	32	35	33.34
3	30	31	31.35	34	36	34.74	39	40	38.66	44	45	42.20
4	36.5	36	36.21	42	42	40.74	49	48	46.03	56	54	51.07
5	43	41	41.06	50	48	46.75	59	55	53.40	68	63	59.94
7.5	59.5	53	53.20	70	63	61.75	84	74	71.83	98	86	82.11
10	75.5	65	65.34	90	78	76.76	109	92	90.26	128	108	104.28

POD Exh. 1, Table 9

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office at Washington, D. C., on the 17th day of November, A. D. 1959.

No. 32158

INCREASED PARCEL POST RATES — 1957

It appearing, That this proceeding was instituted by our order of May 20, 1957, in response to a request filed by the Postmaster General on April 18, 1957; that on November 28, 1958, the Postmaster General filed an amended request for our consent to the establishment of specific zone rates on parcel post and catalogs; that on December 12, 1958, protestants filed a petition to dismiss the request as violative of the Postal Policy Act of 1958; and that action on this petition was deferred pending hearing;

And it further appearing, That such hearing has been held, and a full investigation of the matters and things involved has been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the said petition be, and it is hereby, denied;

And it is further ordered, That our consent be, and it is hereby, given to the zone rates on parcel post and catalogs as so proposed by the Postmaster General.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

COMPARISON BY ACCOUNTS OF EXPENDITURES CHARGEABLE TO FOURTH
CLASS MAIL TO THE TOTAL EXPENDITURES FOR ALL CLASSES OF
MAIL AND SERVICES

FISCAL YEAR 1957

Line No.	Account No.	Total Expenditures	Fourth Class Expenditures	Percent of Expense Appropriated to Fourth Class	Percent of Total Fourth Class Expenditures
		(1)	(2)	(3)	(4)
1	Administration of Post Office Operations				
2	Salaries and Travel, Postmasters	\$ 147,365,430	\$ 10,836,296	7.35	1.73
3	Salaries and Travel, Supervisors	129,774,093	16,792,204	12.94	2.68
4	Mail Handling and Window Service				
5	Salaries and Travel, Clerks, First and Second Class Offices	871,981,397	120,167,626	13.78	19.18
6	Clerks, Third Class Offices	28,727,252	1,603,586	5.58	0.26
7	Contract Station Service	6,386,473	29,953	0.47	0.01
8	Clerical Allowances, Fourth Class Offices	29,434	1,364	4.63	—
9	Collection and Delivery				
10	Salaries and Travel, City Delivery Carriers	618,779,348	72,830,227	11.77	11.63
11	Salaries, Fees and Travel, Special Delivery Messengers	24,288,983	82,621	0.34	0.01
12	Salaries and Transportation, Rural Carriers ...	208,087,220	10,098,848	4.85	1.61
13	Local Transportation				
14	Vehicle Service	79,056,803	39,309,815	49.72	6.27
15	Carfare	4,067,036	76,821	1.89	0.01
16	Mail Messenger and Mail Handling in Transit				
17	Mail Messenger Service	19,614,503	12,061,849	61.49	1.93
18	Salaries and Travel, Postal Transportation Service	191,093,671	50,450,503	26.40	8.05

TABLE 2 (Continued)

COMPARISON BY ACCOUNTS OF EXPENDITURES CHARGEABLE TO FOURTH
CLASS MAIL TO THE TOTAL EXPENDITURES FOR ALL CLASSES OF
MAIL AND SERVICES

FISCAL YEAR 1957

Line No.	Account No.	Total Expenditures	Fourth Class Expenditures	Percent of Expense Appportioned to Fourth Class	Percent of Total Fourth Class Expenditures
		(1)	(2)	(3)	(4)
Operation and Care of Buildings					
21		64,996,788	21,406,813	32.94	3.42
22	280-81-85	3,327,168	363,094	10.91	0.06
23	522-91	34,581,340	14,433,611	41.74	2.30
24	523-28	4,112,237	190,467	4.63	0.03
25	224	12,846,339	4,593,454	35.76	0.73
26	524	3,491,470	1,242,204	35.58	0.20
27	521-92	1,152,932	—	—	—
28	570-575	—	—	—	—
29	580-81-84	—	—	—	—
30	299-364-484	9,642,068	3,176,501	32.94	0.51
Building Equipment, Alterations and Im- provements					
General Postal Supply Services					
31		15,058,396	610,324	4.05	0.10
32	441-42-43	1,088,067	146,174	13.43	0.02
33	44-45-46	—	—	—	—
34	540	4,063,264	1,316,967	32.41	0.21
35	530-31-32	3,840,055	1,249,331	32.53	0.20
36	33-34-36	—	—	—	—
37	550-564	34,067,539	4,576,732	13.43	0.73
38	542-43	126,517	—	—	—
39	547-94	20,928,181	2,603,517	12.44	0.42
40		—	2,180,222	—	0.35
41		—	—	—	—
42		—	—	—	—
43		—	—	—	—
44		—	6,957,700	—	1.11

TABLE 2 (Continued)

COMPARISON BY ACCOUNTS OF EXPENDITURES CHARGEABLE TO FOURTH CLASS MAIL TO THE TOTAL EXPENDITURES FOR ALL CLASSES OF MAIL AND SERVICES

FISCAL YEAR 1957

Line Account No.		Total Expenditures (1)	Fourth Class Expenditures (2)	Percent of Expense Appportioned to Fourth Class (3)	Percent of Total Fourth Class Expenditures (4)
45	Domestic Water Transportation	2,713,700	1,516,971	55.90	0.24
46	Foreign Water Transportation	10,637,304	580,046	5.45	0.09
47	Star Route Service	42,492,770	26,619,753	62.65	4.25
48	Contract Highway Post Offices	5,173,343	1,962,049	37.93	0.31
49	Short Haul Truck Service	12,082,645	9,658,332	79.94	1.54
50	Railroad Service	292,138,357	171,874,856	58.83	27.43
51	Domestic Airmail Service	37,824,794	1,753,677	4.64	0.28
52	Foreign Airmail Service	31,430,415	—	—	—
53	Terminal and Transportation Charges by Foreign Countries	7,095,811	—	—	—
54	Damage Claims	1,138,099	546,249	48.00	0.09
55	Adjusted Losses—Domestic and International Mail	5,309,460	—	—	—
56	Unassigned Expense (Offset by Reimbursements)	800,989	—	—	—
57	Adjustment to cover ordinary feature of registered mail	—	149,105	—	0.02
58	General Overhead	55,143,914	11,696,019	21.21	1.87
59	Post Office Penalty	—	425,028	—	0.07
60	Post Office Registry	—	264,731	—	0.04
61	Payroll Bond Deduction System	—	70,732	—	0.01
62	TOTAL—Fiscal Year 1957	3,046,554,605	626,506,372	20.57	100.00
63	Retirement Contribution, 1957 Basis	127,600,000	18,464,920	14.47	—
64	Increased Railroad Transportation Rates	48,005,815	27,744,974	57.79	—
65	Salary and Related Increases, P.L. 85-426, 85-462	252,869,410	36,950,427	14.61	—
66	TOTAL—Including increased rates and employee benefits	\$3,475,029,830	\$709,666,693	20.42	—

Filed December 14, 1959

(Caption omitted)

Defendants' Motion to Dismiss

Defendants respectfully move this Court for an order dismissing the complaint on the grounds that this is an unconsented suit against the United States, it presents no justiciable controversy, and plaintiffs lack standing to sue. Defendants oppose plaintiffs' motion for a preliminary injunction on the same grounds and on the additional ground that as a matter of discretion the preliminary injunction should be denied.

In support of the motion to dismiss and in opposition to the injunction defendants submit the affidavit dated December 8, 1959 of Postmaster General Arthur E. Summerfield annexed hereto and made a part hereof, and a memorandum of points and authorities.

GEORGE COCHRAN DOUB
Assistant Attorney General

DONALD B. MACGUINEAS
ARTHUR H. FRIBOURG
*Attorneys,
Department of Justice*

Of Counsel:

PAUL MEININGER,
*Associate General Counsel,
Post Office Department*

C. H. JOHNS,
*Associate General Counsel,
Interstate Commerce Commission*

Affidavit of Arthur E. Summerfield

DISTRICT OF COLUMBIA ss:

Arthur E. Summerfield, being first duly sworn, on oath doth say:

I

That he now is, and has been at all times since January 21, 1953, Postmaster General of the United States, and, as such, is charged with the duty of executing all laws relative to the Postal Service.

II

That affiant is making this affidavit in opposition to the plaintiffs' motion for a preliminary injunction to restrain the effectiveness of Federal Register Document 59-10004, filed November 24, 1959, and published November 25, 1959, 24 Federal Register, pp. 9477-78, establishing revised rates of postage, effective February 1, 1960, for application to certain fourth-class mail matter consisting of parcel post subject to zone rates (parcel post) and catalogs and similar printed advertising matter (catalogs).

III

That on November 28, 1958, after consideration by the Post Office Department (Department) of data, views, and arguments submitted to the Department by interested persons at conferences and in writing, pursuant to notices published in the Federal Register on March 4, 1958, and October 4, 1958 (23 F.R. 1556; 23 F.R. 7711), affiant, in his official capacity as Postmaster General of the United States, filed with the Interstate Commerce Commission (Commission) on November 28, 1958, in the proceeding entitled, *Increased Parcel Post Rates, 1957*, Docket No. 32158, an amended request for the Commission's consent to the establishment of increased postage rates and other reformatations on parcel post and catalogs, which said

amended request was filed pursuant to the general provisions relating to the Post Office Department contained in Chapter IV of the Supplemental Appropriation Act, 1951, approved September 27, 1950, as amended by Section 213 of the Postal Rate Increase Act of 1958, approved May 27, 1958 (64 Stat. 1050, 72 Stat. 143, 31 U.S.C. 695), and Section 207 of the Act of February 28, 1925, as amended (43 Stat. 1067, 45 Stat. 942, 39 U.S.C. 247), which read as follows:

On and after September 27, 1950, none of the funds appropriated to the Post Office Department from the general fund of the Treasury shall be withdrawn from the Treasury until the Postmaster General shall certify in writing that he has requested the consent of the Interstate Commerce Commission to the establishment of such rate increases or other reformatations (in addition to any specific increases or other reformatations heretofore or hereafter authorized or prescribed by law), pursuant to the provisions of section 247 of Title 39, as may be necessary to insure (1) that the revenues from fourth-class mail service will not exceed by more than 4 per centum the costs thereof and (2) that the costs of such fourth-class mail service will not exceed by more than 4 per centum the revenues therefrom; *Provided*, That the foregoing shall not be construed to require any increase in the postage rate, established by section 293c of Title 39, for publications or records furnished to a blind person. (31 U.S.C. 695)

Reformation of Classification, etc. The classification of articles mailable, as well as the weight limit, the rates of postage, zone or zones, and other conditions of mailability under sections 240, 293, and 294 of this title if the Postmaster General shall find on experience that they or any of them are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater than the receipts of the revenue therefrom, he is hereby directed, subject to the consent of the Interstate Commerce Commission after investigation, to re-form from time to time such classifications, weight limit, rates, zone or zones or conditions, or either, in order to promote the service to the public or to insure the receipt of revenue from

such service adequate to pay the cost thereof.
(39 U.S.C. 247)

IV

That said amended request was filed in proceedings instituted by the Commission's order of May 20, 1957, in response to a preliminary request of the Postmaster General filed on April 18, 1957, stating that specific proposals for increased rates or other reformatations would thereafter be formulated by affiant and submitted to the Commission for its consent.

V

That prior to the filing of the aforesaid amended request with the Commission, and by notice published in the Federal Register on October 4, 1958 (23 F.R. 7711), interested persons were notified of the specific proposals of the Postmaster General to revise rates of postage on parcel post and catalogs pursuant to the provisions of law cited hereinbefore, and were accorded an opportunity by said notice to (1) obtain available information on which the proposed rate increases and other reformatations were based, (2) confer with representatives of the Department with respect to such proposed reformatations, and (3) submit data, views or arguments for consideration by the Department in determining the extent and character of rate and other reformatations to be established with respect to fourth-class mail.

VI

That, pursuant to the provisions of law cited hereinbefore, the schedules of revised rates on parcel post and catalogs submitted to the Commission for its consent after investigation were necessary to insure (1) that the revenues from fourth-class mail service will not exceed by more than 4 per centum the costs thereof, and (2) that the costs of

such fourth-class mail service will not exceed by more than 4 per centum the revenue therefrom; that said rate schedules were based on the Department's experience, as reflected by available data derived from the revenue and cost findings of the Cost Ascertainment System of the Post Office Department, as to the costs and revenues attributable to parcel post and catalogs for the fiscal period ending June 30, 1957, adjusted to measure the effect of increased costs and other developments which occurred subsequent to the end of said fiscal period, including the prescription by the Commission of increased compensation, rates, and charges applicable to the transportation of United States mail by railroad, increases in postal expenditures and other changes resulting from the enactment of Public Law 85-426, 85th Congress, approved May 27, 1958, and Public Law 85-462, 85th Congress, approved June 20, 1958; and that, on the basis of said experience and the further developments mentioned, affiant found that the rates of postage on parcel post and catalogs established on October 1, 1953 and February 1, 1954, respectively, were such as to render the costs of fourth-class mail service greater than the receipt of revenue from such service by approximately \$88 million.

VII

That the consent of the Commission to affiant's proposals for revised rates of postage on parcel post and catalogs was given on November 17, 1959, and released by the Commission on November 20, 1959; that, thereafter, by Federal Register Document 59-10004, filed November 24, 1959, and published November 25, 1959 (24 F.R. 9477-78), affiant ordered that said revised rates of postage become effective February 1, 1960; and that, in establishing revised rates of postage on parcel post and catalogs effective February 1, 1960, such date was selected for the purpose of affording a reasonable and adequate period of time within which the Postal Establishment and the general public, after notice,

might complete necessary preparations for the conduct of business and mailing operations under revised rate schedules.

VIII

That, in the event a court order is issued enjoining the effectiveness of the revised rates of postage on parcel post and catalogs, thereby delaying or postponing the effective date thereof, the Department will be deprived of postal revenues at the rate of approximately \$7.4 million per month, and to that extent, the objective of the Congress to insure that the costs of such fourth-class mail service will not exceed by more than 4 per centum the revenues therefrom will be defeated and the fiscal program of the United States will be correspondingly impaired; and that the loss of revenue to the United States resulting from the issuance of a preliminary injunction will be increased beyond that experienced during the effective period of such injunction in that, in the event of the dissolution of said injunction and upon expiration of the effective period thereof, affiant will be required, in reestablishing the revised rates of postage on parcel post and catalogs to which the Commission has consented, to afford a reasonable and adequate period of time in which the Postal Establishment and the general public, after notice, may complete necessary preparations for the conduct of business and mailing operations under said rate schedules.

IX

That the issuance of an injunction to postpone the effectiveness of revised rates of postage on parcel post and catalogs to become effective February 1, 1960, as established by Federal Register Document 59-10004, will also result in serious administrative burdens, inconvenience, and expense to the Department and the personnel of the Postal Service for the following reasons:

A. Following the release on November 20, 1959, of the Commission's report and order of November 17, 1959, notices and announcements of the establishment of revised postage rates on parcel post and catalogs effective February 1, 1960, were issued and disseminated to post offices, other postal installations, and users of the mail throughout the United States and elsewhere throughout the world where the domestic postal service is in operation, including many overseas and army post offices, by means of a notice in the Federal Register published on November 25, 1959, by means of a notice and rate schedules in the Postal Bulletin of November 26, 1959 (approximately 72,000 copies), and by means of a press release of the Department on November 21, 1959, and similar releases carried by newspapers, trade, and other publications. Such actions were taken in order that the Postal Service and mailers of the parcel post and catalog services might have a reasonable and adequate period of time within which to make necessary preparations for the conduct of business and mailing operations under the revised rate schedules.

B. The Department on November 27, 1959, placed an order for the printing and dissemination as soon as printed to post offices, other postal installations, and users of the mail throughout the United States of approximately 500,000 rate schedules containing parcel post and catalog rates to become effective February 1, 1960, in addition to the rate schedules set forth in the Postal Bulletin of November 26, 1959 as aforesaid.

C. The issuance of a preliminary injunction in the above-entitled proceeding would necessitate action by the Department to rescind and cancel the notices, announcements, and rate schedules disseminated as aforesaid.

D. On November 30, 1959, and December 1, 1959, the Department instituted procedures for procuring from manufacturers scale charts for use on approximately 30,000

postal scales utilized by post offices and other postal installations in the United States and elsewhere throughout the world, in order that said scale charts may be available in sufficient time for utilization in conducting mailing operations in accordance with the revised schedules of rates effective February 1, 1960. Any delay in the procurement of such charts by reason of the issuance of a preliminary injunction would interfere with required delivery dates and hamper necessary arrangements for mechanical installation of said charts. The issuance of a preliminary injunction would entail additional administrative burden and expense which may be involved in the event of cancellation of procurement orders.

E. In the event the effective date of the revised schedules of rates on parcel post and catalogs is deferred beyond February 1, 1960, the Department would be required to issue additional notices and announcements similar to those described hereinbefore, including the printing and dissemination of appropriate notices and instructions to post offices, other postal installations, and users of mail throughout the United States and elsewhere throughout the world where the postal service is in operation. Also, in the event the schedules of rates for parcel post and catalogs established to become effective February 1, 1960, are ultimately reinstated following the effective period of a preliminary injunction, further notices, announcements and actions similar to those described hereinbefore would again be required.

F. Because of the difficulty of apprising all postal employees and mailers with respect to the proper rates for parcel post and catalogs, the rescission of the affiant's order providing for the establishment of revised postage rates on parcel post and catalogs would be attended by uncertainty in some instances as to the proper rates to be applied. The inability to recall the revised schedules now in the possession of all postal installations and mailers of

parcel post and catalogs, introduces the probability that in some instances postage will be improperly paid or collected, accompanied by resulting demands for refund of postage improperly collected.

G. It is impossible to estimate the actual cost to the Department from the standpoint of loss of manpower, salaries, and other administrative costs which may be occasioned by the administrative burdens described hereinbefore, but it is known that such costs will be substantial in amount.

X

That, in addition to the loss of revenue and the administrative burdens, inconvenience, and expense to the Department and to the field establishments of the Postal Service as described hereinbefore, affiant believes and therefore avers that the issuance of a preliminary injunction will result in inconvenience and expense to users of the parcel post and catalog services in that:

A. Copies of the rate schedules established to become effective February 1, 1960, as aforesaid, have been furnished to mail order and other business concerns which utilize mail for the distribution of parcel post and catalogs, and said concerns have published or are in process of arranging for the publication of such rate schedules in catalogs. Copies of said rate schedules have also been furnished to scale manufacturers who are in the process of preparing new scale charts for use by said mail order and other business concerns. The issuance of a preliminary injunction would require that said mail order and other concerns replace publications or other materials distributed by them prior to the issuance of said injunction and take action to revise or correct publications not distributed prior to the issuance of said injunction. In the event the rate schedules established to become effective February 1, 1960, are ultimately reinstated, following the

expiration of the effective period of an injunction, similar repetitive actions may be required by said mail order and other concerns.

B. Many users of parcel post or catalog services follow practices dictated by the nature of their business or mailing activities of preparing mailings of parcel post and catalogs in advance of actual mailing. The Department has been advised that in some instances such users of parcel post or catalog services are in the process of preparing or will shortly prepare advance mailings which have imprinted thereon nonmetered postage indicia or meter stamps or which have affixed thereto precancelled stamps reflecting postage computed on the basis of the rate schedules established to become effective February 1, 1960. The issuance of a preliminary injunction would require the correction of such postage imprints and advance mailings to reflect the postage rates applicable prior to February 1, 1960.

ARTHUR E. SUMMERFIELD

Subscribed and sworn to before me this 8th day of December, 1959.

LAURENCE B. GOWEN
Notary Public

My Commission expires April 30, 1961.

Memorandum of the District Court

Entered January 8, 1960

(Caption omitted)

MEMORANDUM

The complaint charges that the Postmaster General's Order promulgating new fourth class mail rates as published in the Federal Register November 25, 1959 and effective February 1, 1960 did not give effect to the

standards established by the Congress in the Postal Policy Act of 1958, Public Law 85-426, approved May 27, 1958.

The defendants' motion to dismiss contends that the establishment of fourth class rates is governed by the provisions of Title 39, U.S. Code, Sec. 247, and Title 31, U.S. Code, Sec. 695; that the Postmaster General's Order promulgating the new rates is in conformity with these provisions; and that the Postal Policy Act of 1958 does not apply.

The Court is of the opinion that the standards outlined in the Postal Policy Act of 1958 must be considered in fixing fourth class postal rates and, therefore, in view of the allegations of the complaint, the motion to dismiss will be denied. *Doehla Greeting Cards, Inc. v. Summerfield*, 97 U.S. App. D.C. 29, was decided before enactment of the Postal Policy Act of 1958 and is not determinative of the question to be decided in this case.

However, with respect to the probability of the plaintiffs prevailing on final hearing, it is not clear that the plaintiffs will prevail on the merits. Indeed, the Interstate Commerce Commission, after extensive hearings, made a finding that "The proposed rates will be in conformity with Sec. 247 of Title 38 and Sec. 695 of Title 31, as amended, and the Postal Policy Act of 1958."

Accordingly, weighing the probabilities and having in mind the disruption to the postal service as outlined in the affidavit of the Postmaster General which would result from the issuance of a preliminary injunction, the Court is of the opinion that, in balancing the equities, the motion for a preliminary injunction should be denied.

Counsel will submit an order in conformity with the foregoing.

(s) JOSEPH C. MCGARRAGHY
Judge

January 8, 1960

Order of the District Court (the Order Appealed From)

Entered January 12, 1960

(Caption omitted)

AMENDED ORDER

This cause having come before the Court on plaintiffs' motion for a preliminary injunction and on defendants' motion to dismiss the complaint and the Court having considered the briefs and arguments of opposing counsel and having filed a memorandum dated January 8, 1960, and it appearing that the question whether the Postal Policy Act of 1958 is applicable to the reformation of parcel post and catalogue rates by the Postmaster General is a controlling question of law as to which there is substantial ground for difference of opinion, and it appearing that an immediate appeal from the order of this Court denying defendants' motion to dismiss the complaint may materially advance the ultimate determination of this litigation, it is

ORDERED that plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss be and they hereby are denied, and it is further

ORDERED that the memorandum of January 8, 1960 shall constitute the Court's findings of fact and conclusions of law.

s/ JOSEPH C. MCGARRAGHY
Judge

No objection as to form:

s/ PAUL A. PORTER
Counsel for Plaintiff

s/ ARTHUR H. FRIBOURG
Counsel for Defendants

January 12, 1960

Notice of Appeal

February 12, 1960

(Caption omitted)

NOTICE OF APPEAL

Notice is hereby given this 12th day of February, 1960, that defendant Arthur E. Summerfield, Individually and as Postmaster General, et al, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this court, entered on the 11th day of January, 1960, denying defendant's motion to dismiss the complaint, and the amended order of this court, entered on the 12th day of January, 1960, certifying that the question whether the Postal Policy Act of 1958 is applicable to the reformation of parcel post and catalogue rates by the Postmaster General is a controlling question of law as to which there is substantial grounds for difference of opinion, and that an immediate appeal from the order of this court denying defendants' motion to dismiss the complaint may materially advance the ultimate determination of this litigation.

/s/ OLIVER GASCH

Oliver Gasch

*Attorney for Defendant**Counsel for plaintiffs:*

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